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REPORTS

OF

513

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

DURING THE

DECEMBER TERM, 1884.

BY

JNO. W. SHEPHERD,
STATE REPORTER.

40637

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OFFICERS OF THE COURT

DURING THE TIME OF THESE DECISIONS.

GEORGE W. STONE, CHIEF JUSTICE, Montgomery.

H. M. SOMERVILLE, ASSOCIATE JUSTICE, Tuskaloosa.

DAVID CLOPTON, ASSOCIATE JUSTICE, Montgomery.

THOS. N. McCLELLAND, ATTORNEY-GENERAL, Athens.

JOHN W. A. SANFORD, CLERK, Montgomery.

JUNIUS M. RIGGS, MARSHAL, Montgomery.

STERLING A. WOOD, PRIVATE SECRETARY, Tuskaloosa.

ERRATA.

In *Jones & De Pras v. Robinson*, p. 505, 28th line from top, instead of *Wells v. Norman*, read *Wells v. Morrow*.

In *Barclift v. Treece*, p. 531, 18th line from top, instead of *jurisdiction*, read *administration*.

ADDENDUM.

The following head-note should have been inserted under the title
EXECUTORS AND ADMINISTRATORS:

13. *Revocation of letters of administration, as improvidently granted.*
When letters of administration have been granted as in case of intestacy, and a will is afterwards produced and proved, the statute makes it mandatory on the court to revoke such letters on the application of the person named as executor (Code, § 2414); but, when such letters are granted on the representation of the person appointed that the decedent left no will, although the will had been already admitted to probate, and the estate administered under it for many years, the court may revoke them, on the application of any person interested in the estate, or even *ex mero motu*, as having been irregularly and improvidently made. *Watson v. Glover*, 323.

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CASES
IN THE
SUPREME COURT OF ALABAMA.

DECEMBER TERM, 1884.

Martin v. The State.

Indictment for Murder.

1. *Organization of grand jury; recitals construed as to number of jurors appearing and serving.*—Where the record, in its caption, contains these recitals: "The sheriff returned into court the *venire facias* commanding him to summon the following named persons to serve as grand jurors, to-wit," setting out the names of eighteen persons, and among them C. H. Spencer, T. R. Sylvester, Hugh McLean, and D. McDonald; "of whom fifteen appeared to serve, and C. H. Spencer was appointed foreman, who, with the other qualified citizens (except T. R. Sylvester, Hugh McLean, and D. McDonald, who was excused by the court), competent as grand jurors, were duly sworn," &c.; these recitals show, with sufficient certainty, that the three jurors named were excused from service, and that the remaining fifteen were sworn and organized into a grand jury.

2. *Special and adjourned terms; order setting day for trial.*—Where the record shows that the trial was had at an extra term of the court, which was called and held in strict conformity with the statutory provisions regulating both special and adjourned terms (Code, §§ 652, 654; Sess. Acts 1874-5, p. 201; *Ib.* 1875-76, p. 210), and on the day specified in the orders calling said extra term; it is no objection to the regularity of the proceedings, that the order fixing the day for the trial was made on the day before the final adjournment of the regular term, while the order for the adjourned term was not made until the next day, and just before the adjournment; nor is it necessary that an order should be made at said extra term, setting a day for the trial.

3. *Special venire in capital case, at special or adjourned term.*—When the order setting the day for the trial at the special or adjourned term directs "that the names of fifty competent persons be drawn and summoned for the trial of this case," and the order for the adjourned term also directs that the same number be drawn "to serve as petit jurors at said adjourned term"; and the jury is organized, without objection, from the *venire* thus drawn and summoned (Code, §§ 4739, 4874), there is no irregularity which is available on error. (STONE, C. J., "inclining to the opinion, that section 4739 should be held to apply to all extra terms, whether special or adjourned.")

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4. *Proof of former difficulty ; admissibility of entire conversation, when part has been received.*—Proof of a previous altercation or difficulty between the defendant and the deceased, a few days before the killing, is admissible evidence against the defendant, though the particulars or merits of that difficulty cannot be inquired into; yet, when the prosecution has proved the defendant's subsequent declarations relative to that difficulty, in the nature of threats, and the defendant has proved other parts of his declarations in the same conversation, the prosecution may call for all that was said at the time by the defendant as to the former difficulty.

5. *Declarations of deceased ; when admissible as res gestæ.*—The declarations of the deceased, made to his wife, when leaving home on the morning of the killing, that he was going to a specified place, are competent evidence on the principle of *res gestæ*.

6. *Declarations of defendant ; when not admissible.*—The declarations of the defendant, made on the day before the killing, to the effect that he desired to be on friendly terms with the deceased, and would give the witness \$50 if he would effect a reconciliation between them, are not competent evidence for him.

7. *Charges as to malice, provocation of the difficulty, retreat, and self-defense*, ten in number, to which exceptions were reserved by the defendant, held to be in strict harmony with many former rulings of this court, which are cited.

8. *Charges as to reasonable doubt, and probability of innocence.*—A charge asserting that "reasonable doubt, and to a moral certainty, does not mean to an absolute or mathematical certainty, but means an actual and substantial doubt growing up out of the evidence;" and that a "probability of the defendant's innocence means more than a possibility that he is not or may not be guilty," is free from error.

FROM the Circuit Court of Barbour.

Tried before the Hon. H. D. CLAYTON.

The defendant in this case, Edward R. Martin, was indicted for the murder of Pleasant B. Patterson, by shooting him with a pistol; pleaded not guilty, was convicted of murder in the second degree, and sentenced to the penitentiary for the term of twenty years. The indictment was found at the November term of the court, 1883, as shown by the recitals of the caption, as follows: "Be it remembered that, on this, being Monday, the 19th day of July, 1883, the Circuit Court of said county was opened according to law; present and presiding Hon. H. D. Clayton," &c. "The sheriff returned into open court the *venire facias* commanding him to summon the following named persons, to serve as grand jurors, to-wit," setting out the names of eighteen persons, including C. H. Spencer, T. R. Sylvester, Hugh McLean, and D. McDonald, and then adding: "of whom, fifteen appeared to serve, and C. H. Spencer was appointed foreman, who, with the other qualified citizens (except T. R. Sylvester, Hugh McLean, and D. McDonald, who *was* excused by the court), competent as grand jurors, were duly sworn and impanelled according to law; and, among other things, the following bill of indictment was returned into open court by said grand jury, to-wit," setting out the indict-

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ment. The trial was had at a special or adjourned term of the court, commenced on the 16th July, and ended on the 21st. The several orders of the court relating to this term are copied in the opinion of the court. No objection was made to the regularity of any of these proceedings, so far as the record shows.

As to the circumstances attending the homicide, it appeared that the defendant and the deceased, each on horseback, met in the public road, between two and three miles from Mount Andrew in said county, on the 24th August, 1883, and when they had approached within ten or fifteen feet of each other, the defendant, who had drawn his pistol, fired at the deceased and killed him, his body being found in the road by neighbors, to whom the defendant had at once reported the shooting, and surrendered himself. There had been another difficulty between them, a few days before; and the defendant stated, on surrendering himself, that when they approached each other in the road, the deceased put his hand in his pocket, and made a motion as if to draw a pistol; but it was proved that no pistol was found on the body of the deceased, or in the road at the place where it was found. L. B. Bush, a witness for the State, was asked, "whether he had heard the defendant, in a conversation with him about the deceased, a few days before the killing, use threats;" and answered, "that defendant said, *'He may kill me, but we have sworn to kill him. If I get the same chance at him that he had at me, it would be different.'*" Defendant's counsel then asked witness, if that language was not immediately preceded by defendant's telling him that Patterson had thrown an axe at him, and shot at him four times in the public road: and witness answered, that it was. The State then asked said witness to repeat all that defendant said in that conversation, detailing the occurrences of the previous difficulty, to which defendant's question and the answer thereto related. The defendant objected to this, because it would be proving by hearsay the details of a previous difficulty; and because the answer could not tend to explain whether the language detailed by the witness as a threat was in fact a threat; and because the question was irrelevant and illegal." The court overruled the objections, and permitted the witness to answer the question, but stated that it was only for the purpose of enabling the jury to determine whether the language used by the defendant, as detailed by the witness, was a threat, or, as contended by his counsel, a mere boast that he was a better man; to which ruling the defendant excepted." The witness having answered the question, stating all that the defendant had said about his former difficulty with the deceased,

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the defendant renewed his objections to the answer, and excepted to the overruling of them.

"The State introduced Rosa Patterson as a witness, who was the wife of the deceased, and who testified, in answer to a question by the solicitor, that the deceased left home, on the day of his death, about one o'clock p. m., and told her he was going to Mount Andrew. The defendant objected to this question and answer, and moved to exclude the answer, because it was hearsay, and because it was not shown that he (defendant) had any knowledge of his purpose in going to Mount Andrew, and because it was irrelevant and illegal;" and he excepted to the overruling of his objections.

"The defendant introduced Daniel McKenzie as a witness, and offered to prove by him that, on the day before the killing, he expressed himself to witness as being desirous of living on friendly terms with the deceased, and said that he would give witness \$50 if he would effect a reconciliation." The court excluded this evidence, on objection by the State, and the defendant excepted.

The defendant objected to several portions of the general charge of the court, which it is unnecessary to state, and also to each one of the following charges, which were given on the request in writing of the solicitor:

"4. To make out a case of justifiable self-defense, the evidence must show that the difficulty was not provoked or encouraged by the defendant; that he was, or appeared to be, so menaced at the time as to create reasonable apprehension of danger to his life, or of grievous bodily harm, and that there was no other reasonable hope of escape from such present impending peril.

"6. To make the plea of self-defense available, the defendant must be without fault. If he was himself the first aggressor, he can not invoke the doctrine of self-defense, even if the deceased was approaching him in a hostile manner; and whether the necessity to take the life of the deceased was real or only apparent, if brought about by the design, contrivance or fault of the defendant, he can not be excused on the plea of self-defense.

"7. If a party, dangerously armed, provokes a hostile demonstration with an undue advantage, he is guilty of murder, if he slays his adversary pursuant to a previously formed design to use his weapon in an emergency. Previous preparation for a rencounter evinces deliberation and premeditation, and, unexplained, is evidence of express malice.

"8. If the defendant had a good reason to apprehend an attack from the deceased, he had the right to arm himself for self-defense, but not for aggression. His responsibility for the

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subsequent use of his weapon is not diminished, because of the right he had to obtain and carry it. If, after having obtained it, he travelled the public road, expecting to meet the deceased, and provoked the fatal rencounter, the degree of his guilt is the same that it would have been if no reason for apprehending an attack had been furnished by the previous conduct of the deceased. If, notwithstanding the existence of apprehension, the jury are satisfied, beyond a reasonable doubt, that the killing was malicious—that the weapon was obtained and carried by the defendant, not for the purpose of defense alone, but with a view to a rencounter, in which he intended to take the life of the deceased, and which he intended to provoke, or did not intend to avoid—the degree of the offense is not mitigated.

“9. If the circumstances are such as to create the impression that the deceased had commenced to draw a pistol, before the defendant drew, or attempted to draw his; or if the circumstances generate a reasonable doubt whether such was not the case; then this should be considered in determining the grade of the homicide, but could not reduce it to self-defense, unless the deceased made the first hostile, dangerous demonstration, and the defendant had no other reasonable mode of escape. If the defendant first commenced to draw his pistol, that would have authorized the deceased to draw his in self-defense, if he had one; and any peril thereby brought on the defendant would have been of his own producing, and would deny to him the benefit of the plea of self-defense. Human life is not taken with impunity, and the defendant can not be excused on the plea of self-defense, if he provoked or encouraged an act producing a necessity, or seeming necessity, or failed to retire from it when he could have done so without endangering his life, or exposing himself to grievous bodily harm.

“10. If the deceased, when within one hundred and fifty or two hundred yards of the defendant, approaching each other on a public road, made a hostile demonstration with his hand, or otherwise, which impressed the defendant with the belief that the deceased intended, when they met, to attack him with a weapon, or otherwise; yet, if the defendant could have reasonably avoided the threatened danger, by leaving the public road, and taking a by-path, or by going into the woods, it was his duty to have done so, and if he did not, he can not be excused on the plea of self-defense, if he had previously armed himself with a pistol, to be used against the deceased in case of a difficulty, and he anticipated there would be a difficulty when they met.

“11. In case of homicide, the law presumes malice from the use of a deadly weapon, and casts on the defendant the *onus* of repelling the presumption, unless the evidence which proves

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the killing shows also that it was perpetrated without malice; and whenever malice is shown, and is un rebutted by the circumstances of the killing, or by other facts in evidence, there can be no conviction for any less degree of homicide than murder.

"14. If the defendant, in this county, before the finding of the indictment, purposely killed the deceased by shooting him with a pistol, after reflection, with a wickedness or depravity of heart towards said deceased, and the killing was determined on before hand, even a moment before the fatal shot was fired, the defendant is guilty of murder in the first degree.

"15. If the defendant, in this county, and before the finding of this indictment, purposely killed Pleasant B. Patterson by shooting him with a pistol, with a wickedness or depravity of heart towards said deceased, and the killing was determined on beforehand, and after reflection (for however short a time before the fatal shot was fired is immaterial), the defendant is guilty of murder in the first degree.

"16. If the defendant, in this county, and before the finding of this indictment, killed Pleasant B. Patterson by shooting him with a pistol, with malice aforethought, he is guilty of murder; and if said killing was willful, deliberate, malicious, and premeditated, and the deliberation and premeditation existed for only a moment before the fatal shot was fired, the defendant is guilty of murder in the first degree."

"The court gave, also, thirty-seven charges in writing asked by the defendant," twenty-two of which are set out in the bill of exceptions, "and then gave, at the request of the solicitor, the following charges in rebuttal: "(3.) Reasonable doubt, and to a moral certainty, does not mean to an absolute or mathematical certainty. It means an actual and substantial doubt growing up out of the evidence—not that it is possible the defendant is not guilty, or that it may be he is not guilty. (5.) In the defendant's charges, when they say 'If there is a probability of the defendant's innocence,' probability means more than a possibility he is not guilty, and more than that it may be he is not guilty." To each of these charges the defendant excepted.

J. M. WHITE, and H. D. CLAYTON, Jr., for appellant.

T. N. McCLELLAN, Attorney-General, for the State.

STONE, C. J.—1. The statute prescribes, that at least fifteen persons must be sworn, to constitute a grand jury. Code of 1876, § 4753. It is contended for the prisoner, that under a proper interpretation of the caption, or recorded organi-

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zation of the court at which the indictment was found, only twelve persons constituted the grand jury. We do not so interpret the record. According to our construction, of the eighteen persons named in the *venire*, three named persons—T. R. Sylvester, Hugh McLean, and D. McDonald—were excused by the court, and the remaining fifteen were sworn and organized into a grand jury, with C. H. Spencer as foreman. There is nothing in this objection.

2. The defendant was tried and convicted at an irregular, or extra session, of the court. In some of the proceedings, the term is called an adjourned term, and in others a special term. It seems to have been appointed and called in both forms. While the regular Spring term was in session—May 30th, 1884—the court caused the following order to be entered on the minutes: “The defendant, E. R. Martin, *alias* Edward R. Martin, being present in open court, and attended by counsel, it is ordered by the court, that Wednesday, the 16th day of July next, be set for the trial of this case, and that fifty competent persons be drawn and summoned for the trial of this case; and the defendant being in actual confinement, it is further ordered, that a list of the persons so drawn and summoned, and a copy of the indictment, be served on the defendant in person, so soon as practicable.” On the next day, the following order was made: “And now, on this, the 31st day of May, A. D. 1884, the presiding judge having failed to dispose of all the business, it is ordered by the court, that the court do now adjourn until Wednesday, the 16th day of July next, when it will re-open to dispose of unfinished business; and there being a capital felony for trial at said adjourned term, it is further ordered, that the names of fifty competent persons be drawn from the box by the proper officers, as required by law, to serve as petit jurors at said adjourned term.”

Up to this point, there can be no question that the July term was to be in all respects an adjourned term, under the act “to require circuit judges more promptly to dispose of all business in the Circuit Courts,” approved February 29, 1876.—Sess. Acts, 210; Code of 1876, § 654.

When the court convened in July, the following entry was made: “On this, the 16th day of July, A. D. 1884, the Circuit Court of said county met, and was opened in form in adjourned term, in pursuance of the following order, to-wit: “Circuit Court, Spring term, 1884. It appearing that Ed. R. Martin, *alias* Edward R. Martin, is now confined in jail under an indictment for murder, and the time fixed by law for the regular term of the court is insufficient for the trial of said case; it is therefore ordered, that a special term of the Circuit Court for Barbour county will be held, beginning on Wednesday, the

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16th July next, for the trial of the said Edward R. Martin under said indictment ; and it is further ordered, that fifty competent jurors be drawn and summoned, as provided by law, and that thirty days notice of said special term of said court be given by advertisement of this order in the *Clayton Courier*, a newspaper published in said county. Signed and dated this 31st day of May, 1884. 'H. D. CLAYTON, Judge 3d judicial circuit.' Which said order was published for thirty days, as notice of said special term, in the *Clayton Courier*, a newspaper published in said county : Present and presiding, Hon. H. D. CLAYTON," &c.

This is a full compliance with the statute "to provide for holding special terms of the Circuit Court," approved February 3d, 1875.—Sess. Acts, 201 ; Code of 1876, § 652. We have a case, then, of a court which was lawfully appointed and called, both as an adjourned term and as a special term.

The order setting a day for the trial of the accused was made during the regular term, on May 30 ; while the order made for the adjourned term was not entered of record until May 31. It is contended that the order setting the day for the trial was invalid, because, when it was made, July 16 was not a day of a lawful term of the court, as matters then stood ; in other words, that the day set was then outside of any lawful term of the court. This objection is more specious than real. It is said that, during the term of a court, all the proceedings are in the breast of the judge. The meaning of this is, that so long as the term of the court lasts, all judgments or orders are subject to be vacated, recalled, or modified, at the pleasure or will of the presiding judge. The inference is irresistible, that when the order was made, fixing the day for defendant's trial, the court had determined to hold an adjourned or special term, and had determined the day on which it would be held. The entry of such order on the records is usually and naturally the last order made at the regular term. It is then the court adjourns to a future day, called an adjourned term. It is difficult to conceive of any injury this could do the defendant. He was present in court when the order was made, and was as fully notified thereby, as if the order fixing the adjourned term had been previously entered of record. The court did not err in fixing, at the regular term, the day for the trial of the defendant at the adjourned term. The statute provides, that the "judge may prescribe the order in which such unfinished business shall be disposed of."

3. It is objected, however, that the *venire* for the trial of the accused should not have been "drawn and summoned," but should have been constituted as *venires* are in the trial of capital cases at regular terms.—Code of 1876, § 4874.

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It must be borne in mind, that the term of the court, at which the defendant was tried, was legally ordered and called, alike as an adjourned and as a special term. The jury was drawn and summoned in exact pursuance of statutory requirements for juries at special terms of the court. A capital felony was to be tried, and the court ordered fifty names to be drawn and summoned.—Code of 1876, § 4739. These constitute the *venire*, from which the jury is to be selected and organized, unless the panel is exhausted before the jury is complete; in which case, talesmen must be summoned as in other capital cases.—*Levy v. The State*, 48 Ala. 171. We are satisfied this is the true spirit and interpretation of the section under discussion; for section 4874 of the Code contemplates that there will be in attendance regular juries for the week or term, who constitute a part of the *venire* the sheriff is commanded to summon. This is not consistent with the directions for summoning juries for special terms of the court.—Code, § 4739. There is nothing in this objection. We may add, that there was no objection in the court below to the manner of summoning the *venire*; but we do not make this the ground of our decision.

For myself, I incline to the opinion, that section 4739 of the Code of 1876 should be held to apply to all extra terms, whether special or adjourned. The substance of that section is found in the Code of 1852, § 3446; Rev. Code, § 4068. At that time, and until February 29, 1876, adjourned terms were not known. It would maintain the harmony of the system to give it this interpretation, and I confess myself unable to find in the two statutes—that of February 3, 1875, and that of February 29, 1876—a substantial reason for different interpretation. Each statute, in a sense, provides for an extra term of the court, and each authorizes a special, as distinguished from a general term. In each, as provided to be organized, there will be difficulty in finding “regular juries for the week or term,” to constitute a part of the *venire* the sheriff is required to summon under section 4874 of the Code. This question, however, is not intended to be decided.

4. The questions to Bush, and his answers to them, do not raise the question of proving the details of a previous difficulty. That is not permissible, lest, in passing on the merits of one charge, the attention of the jury may be diverted, or confused, by laying before them the details and merits of another.—*McAnally v. The State*, 74 Ala. 9. The true question was one of the entirety of a conversation. Part of the conversation had been proved against the defendant, as a threat. Thereupon, defendant called out other parts of the same conversation, deemed favorable to himself. The State

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then called for the whole conversation relating to the same subject-matter. This either party was entitled to, for the better understanding of that part already in evidence.—*McLean v. The State*, 16 Ala. 672; 1 Greenl. Ev. § 201.

5. There was no error in permitting Mrs. Patterson to testify, that the deceased, when he left home, told her he was going to Mount Andrew. It was legal evidence, as a *res gestæ* declaration.—1 Greenl. Ev. § 108.

6. The testimony sought to be elicited from the witness, McKenzie, was not legal evidence. It was *res gestæ* to nothing, and its admission would have been to allow defendant to make testimony for himself.—*McLean v. The State*, 16 Ala. 672; *The State v. Umfried*, 76 Mo. 404; *Rea v. The State*, 8 B. J. Lea, 356; *Billingslea v. The State*, 68 Ala. 486; *Stewart v. The State*, 63 Ala. 199.

The first page of the charges is stated so confusedly that we can not undertake to decide the questions attempted to be raised.

7. The court gave, at the instance of the State, charges Nos. 4, 6, 7, 8, 9, 10, 11, 14, 15 and 16; and to the giving of each defendant excepted. They relate to the doctrine of malice, provocation of the difficulty, retreat, and self-defense; and are in strict harmony with many rulings of this court.—*Mitchell v. The State*, 60 Ala. 26; *Ex parte Brown*, 65 Ala. 446; *Ingram v. The State*, 67 Ala. 67; *Cross v. The State*, 63 Ala. 40; *Storey v. The State*, 71 Ala. 329; *DeArman v. The State*, *Id.* 351.

8. Explanatory charges 3 and 5 are free from error.—*Coleman v. The State*, 59 Ala. 52; *Bain v. The State*, 74 Ala. 38.

Affirmed.

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Indictment for Murder.

1. *Applications for continuance, and admission as to testimony of absent witness; what is revisable.*—Applications for a continuance, or requiring an admission as to the alleged testimony of an absent witness, are addressed to the discretion of the trial court, and its action is not revisable on error or appeal.

2. *Exception to ruling or action invoked by party excepting.*—No exception can be based upon any ruling or action of the court below which was induced by the request or objection of the party excepting.

3. *Special venire; when required or authorized.*—A special venire is only authorized, or necessary, in capital cases (Code, § 4874); and under

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an indictment for murder, the defendant having been convicted, on the first trial, of murder in the second degree (which is not a capital offense), he is not entitled to demand a special venire on his second trial, if the former judgment is properly pleaded.

4. *Former conviction, or acquittal; how pleaded and tried.*—A former conviction or acquittal must be specially pleaded; and when so pleaded, the issue joined on it must, properly, be tried and determined, before the issue on the plea of not guilty is submitted to the jury.

5. *Malice and self-defense; charges as to.*—A homicide can not be committed with malice and premeditation, and yet in self-defense; and charges asked, asserting, by implication, that the defendant is entitled to an acquittal on the ground of self-defense, although he acted with malice and premeditation, are contradictory, self-repugnant, and calculated to mislead.

6. *Retreating to avoid homicide; charge as to.*—Whether the party assailed could have retreated conveniently and safely, without apparently putting himself at a probable disadvantage, is a question of fact for the decision of the jury; and a charge asked, which asserts as matter of law, on certain facts hypothetically stated, that he was not bound to retreat, is properly refused.

FROM the Circuit Court of Calhoun.

Tried before the Hon. LEROY F. BOX.

The defendant in this case, John A. DeArman, was indicted for the murder of Seaborn J. Crook, by shooting him with a gun, and, on the first trial, was convicted of murder in the second degree; but the judgment was reversed by this court, and the cause was remanded, as shown by the former report of the case. 71 Ala. 361. On his second trial, at the January term, 1885, the defendant reserved a bill of exceptions, as follows: "At the last term of the court, it was ordered by the court, in the presence of the defendant and the solicitor, and with their consent and concurrence, and for the convenience of the parties, that the cause should be called on Monday of the second week of the term; the court then announcing that, inasmuch as there had been several continuances of the cause, both parties would be expected to be ready for trial at the present term; and offered to give compulsory process to either party, or to both, to procure the attendance of witnesses at the present term. No such process was asked for by the defendant. At the present term, the case was accordingly called on Monday of the second week, when the defendant stated to the court, through his counsel, that he did not know whether or not his witnesses were all present, but, whether they were or not, he was unwilling to go to trial on that day, because no day for the trial had been set by order of the court made at this term, and no special jury had been summoned for the trial; and the defendant demanded a special jury, as in capital cases. Thereupon, the court appointed Wednesday of the second week for the trial, and made an order for summoning a special jury, as shown by the record; and, at the same time, the court notified the parties

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that they would be expected to be ready for trial on Wednesday, and proposed to give the defendant compulsory process to procure the attendance of his witnesses; but the defendant stated, through his counsel, that he did not want such process. When the cause was called for trial on said Wednesday, the State announced ready, and the defendant then moved the court to continue the cause, on account of the absence of William Poland, who had been duly summoned as a witness; but the court refused to grant said motion. The defendant then offered to show due and legal diligence to procure the attendance of said witness, and that he was not absent by his procurement or consent; and requested the court to put the State on the admission of what he expected to prove by said witness, if he were present, as shown by his testimony on the former trial, embodied in the bill of exceptions then reserved; and stated to the court that he was ignorant that said witness would not be present, until his name was called and he failed to respond; and asked that the State be put upon a showing as to the witness. The court declined to put the State on the showing or admission as asked; and stated that the refusal was not on the ground that diligence had not been exercised, nor on the ground that the testimony of the witness had not been reduced to writing and sworn to; and stated to defendant that he should have compulsory process for said witness, if he desired it, and that the trial would be delayed, if necessary, to procure the attendance of said witness. But the defendant declined to take such process, and excepted to the refusal of the court to put the State on the admission of what said witness would swear. . . . During the trial, and while the defendant was introducing and examining his witnesses, when said Poland was called, he appeared in court, and was introduced and examined as a witness by the defendant."

The defendant made a similar application on account of the absence of "sixteen other witnesses," who had been duly summoned, and had been examined as witnesses on the former trial, to prove the character of the deceased as a violent, turbulent, and dangerous man; and asked that the State be put on an admission of what said absent witnesses, if present, would swear; and the bill of exceptions further states, in this connection, that during the progress of the trial, while the defendant was introducing and examining his witnesses, "several of said absent witnesses, when they were separately called, appeared in court, and were introduced and examined as witnesses by the defendant."

The defendant then pleaded not guilty, and the verdict on the former trial as an acquittal of murder in the first degree, and the trial proceeded on issue joined on these pleas; the

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judgment-entry only reciting, "issues being joined, thereupon came a jury," &c., who returned a verdict finding the defendant guilty of manslaughter in the first degree, and fixing his punishment at confinement for four years in the penitentiary. The evidence adduced on the trial, as set out in the bill of exceptions, which purports to state "all that the evidence tended to prove," showed that the deceased was shot and killed by the defendant, on Tuesday morning, August 16th, 1881, in front of the hotel building in the town of Jacksonville in said county; that the defendant was sitting on his horse at the time, having his gun lying across the saddle in front of him, and fired without raising his gun; that the defendant had ridden into town that morning, having his gun before him and a horn around his neck, and followed by his dogs, and while sitting on horseback in front of, or near a liquor saloon, the deceased crossed the street within fifty feet of him, entered a store, came out with three Springfield rifles, and went to the entrance of the hotel, where he set down the rifles in the hall, and approached the defendant with a large hickory stick in his hands; and after some words between them, as to the substance of which the witnesses differed, he was not more than five feet from the muzzle of the defendant's gun when the fatal shot was fired, which killed him almost instantly. The deceased was the town marshal of Jacksonville at the time he was killed, and was a young man, large, stout and active; and the defendant introduced evidence of his character as a violent, turbulent, and dangerous man, especially when under the influence of liquor. The defendant introduced, also, evidence of threats made against him by the deceased, on different occasions, which were communicated to him before the killing; and that one George Brown had said to him, a few minutes before the shooting: "*You had better look out; I heard Seab. Crook say this morning, that he would kill you if you came to town to-day.*" On the other hand, the State introduced evidence of the defendant's declarations, after the killing, "*I came here to kill you, and, by God, I've done it;*" or, "*I have done what I came to do: I came to kill you, and, God damn you, I've done it;*" and at another time, after his arrest: "*I've done wrong. I expect they will penitentiary me, or hang me; I don't care a damn which. I don't intend to employ any lawyer. I consulted my family about it last night, and it was all right. Seab. Crook beat me up once, and broke two of my ribs, and I am an old man.*"

The defendant asked the following charges to the jury, which were in writing, and each of which was refused by the court, exceptions being duly reserved to their refusal:

"1. Although the jury may believe, from the evidence, that

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the defendant killed Crook with premeditation, and with malice, yet, if they believe, from all the evidence, that he killed Crook in self-defense, or if they have any reasonable doubt as to whether he killed Crook in self-defense, they must give the defendant the benefit of this doubt, and, in either case, must acquit him.

"2. It is not every premeditated and malicious killing that is murder—the killing must also be unlawful; and if one person kills another in self-defense, such killing is not unlawful. Then, although the jury may believe that the defendant killed Crook with premeditation and malice, yet, if they further believe, from all the evidence in the case, that he killed said Crook in self-defense; or, if the jury have a reasonable doubt, upon all the evidence, whether he killed said Crook in self-defense, they must give the defendant the benefit of this doubt, and must, in either case, acquit him.

"3. Although the defendant may have killed Crook with malice and premeditation, yet, if the jury believe, from all the evidence, that such killing was not unlawful, then such killing is not criminal: a killing is not unlawful that is done in self-defense.

"4. If the jury believe, from the evidence, that Crook had, for some time prior to the killing, and in the spring of 1881, threatened to kill the defendant; and that this threat had been communicated to the defendant soon afterwards; and that Crook had beat the defendant over the head with a pistol, and, on the Friday before the killing, had threatened to kill the defendant; and further, that on the morning of the killing, and an hour before the killing, he threatened to kill defendant if he came to town that day; and that defendant did come to town that day, and this threat was communicated to him just a few minutes before the killing; and that Crook advanced towards defendant with a gun or guns, and was a man of dangerous and resentful character, and of bad character for peace and quiet; then defendant need not leave the town, or secrete himself, to avoid meeting Crook, but might go in the direction, and where Crook was, provided it was a public place; and if Crook then made any demonstration to carry his threat into execution, as by an attempt to draw a pistol, then the defendant need not retreat, but the law permitted him to use all reasonable means to free himself from the apparent danger; and if he used no more means than necessary, the jury must acquit him."

After conviction, the defendant moved in arrest of judgment, on the ground of error in the several rulings to which, as above stated, he had reserved exceptions, and "because the court erred in the order directing the sheriff to summon the special *venire* for the trial of this case, in this: that said order

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directs the sheriff to summon sixty persons from the qualified citizens of the county, including the regular jurors summoned for the week, when it should have directed him to summon sixty persons from the qualified citizens of the county, including those summoned and in attendance for the week, and the regular jurors summoned for the week were not named in the list of the special jury." The court overruled the motion, and the defendant excepted.

GEO. W. PARSONS, and WM. H. DENSON, for appellant.

T. N. McCLELLAN, Attorney-General, for the State.

SOMERVILLE, J.—It is a matter resting entirely within the discretion of the trial court, to continue or refuse to continue causes, civil or criminal, and such action can not be revised on error. And the rule applicable to putting the State, in criminal causes, to the admission as to what an absent witness of a defendant would testify, if present, is necessarily the same. The primary court has a discretionary power to require either party to make a proper showing, under oath, as to what he expects to prove by an absent witness, and what diligence he has used to obtain his testimony; and if the adverse party refuses to admit what it is alleged such absent witness would swear, the practice is not to continue the cause on account of the absence of such testimony. There is nothing in the action of the court touching these matters which is subject to our review. And if it were otherwise, we are not prepared to say that its discretion has not been exercised, in every particular, so as to be entirely free from criticism.—*Peterson v. The State*, 63 Ala. 113; *Ex parte Jones*, 66 Ala. 202; Rules of Practice, No. 16, Code, 1876, p. 160.

2. Whether the Circuit Court erred, under the peculiar circumstances of this case, in ordering a special *venire* of jurors to be summoned for the trial, in accordance with section 4874 of the Code (1876), is one of the questions raised by the record, and urged upon our consideration. It is a sufficient answer to this inquiry, that the court had jurisdiction to grant this order, and it was granted in response to an express demand for such a jury, made by the defendant prior to entering upon the trial; and no exception can be based upon any ruling of a court which was induced by the request or objection of the party excepting. Our past decisions fully commit us to this salutary principle. *Shelton v. The State*, 73 Ala. 5; *Leonard's Case*, 66 Ala. 461.

3. We may add, however, that no difficulty can arise, in similar cases in the future, if the proper practice is enforced. The indictment is for murder, and to this the defendant pleaded

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“not guilty,” and “former acquittal” of murder in the *first* degree, at a previous trial of the same cause in the year 1882. Special *venires*, under section 4874, are authorized only where a defendant is charged with a capital offense. Murder in the first degree is a capital offense, but not so with murder in the second degree. Now, a former acquittal or conviction is required, under our practice, to be specially pleaded. This was settled in *Rickles v. The State*, 68 Ala. 538, and had long been the uniform practice in this State. And when such special plea is interposed, it has been held irregular to submit an issue upon it, and upon that of not guilty, for simultaneous determination by the jury. The issue joined on the special plea must first be tried and decided.—*Moody v. The State*, 60 Ala. 78; *Foster v. The State*, 39 Ala. 229. If the sufficiency and truth of this special plea is first tried, and it is fully sustained, the effect is to eliminate entirely from the indictment, and from the case, the higher grade of the offense of which the defendant was acquitted, and the indictment will stand as a charge only of the lesser offense involved in it.—*Bell and Murray v. The State*, 48 Ala. 684; *Mitchell's Case*, 60 Ala. 26. If the special plea is not sustained, being permitted to plead over, the defendant will, of course, be tried upon the original indictment, without any modification of the crime charged by it.—Whart. Cr. Pl. & Pr. (8th Ed.) § 478. A strict observance of these rules, as we have said, will leave no room for any trouble in solving like questions in the future.

4. The first three charges in the record, requested by the defendant, were properly refused by the court, because they were repugnant and misleading. Each asserts the proposition, at least by implication, that one may kill another with *malice* and *premeditation*, and yet do so in self-defense, so as to be acquitted of all criminality. Malice, or, as it is commonly called, malice prepense, or aforethought, is the chief characteristic of murder, and has been said to be the grand criterion by which it is distinguished from any other species of homicide.—1 Russell on Cr. (9th Ed.), 667. It is indicative of a wicked, depraved, and malignant spirit—a heart regardless of social duty, and deliberately bent on mischief.—Foster, 256. And it can scarcely mean less than an intent from which flows an unlawful and injurious act committed without legal justification. 1 Bish. Cr. Law (7th Ed.), § 429. Self-defense is the creature of necessity, and a killing in self-defense must be a killing from necessity, and not from malice and with premeditation. “In all cases of homicide excusable by self-defense,” says Mr. Russell, in his work on Crimes, “it must be taken that the attack was made upon a sudden occasion, and *not premeditated*, or *with malice* ;” and after observing that the person who kills another

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in his own defense should have retreated as far as he conveniently and safely could have done, to avoid the violence of the assault, before he turned upon his assailant, the same author adds, that "in no case will a retreat avail, if it be feigned, in order to get an opportunity or interval to enable the party to renew the fight with advantage."—1 Russ. Cr. (9th Ed.), 889; *People v. McLeod*, 1 Hill (N. Y.) 377; s. c., Cases of Self-defense, Hor. & Thomp. 792. So, as said by Hawkins, "if one man assault another with malice prepense, and, after driving him to the wall, kill him there in self-defense, he is nevertheless guilty of murder in respect of his first intent."—1 Hawkins P. C., c. 31, section 26; Roscoe's Cr. Ev. 753; *DeArman v. The State*, 71 Ala. 361. It is the sheerest solecism to say, that one has premeditatedly and maliciously killed another in self-defense. It is manifest that the charges in question, in the light of these familiar principles, are self-contradictory and repugnant, and were properly refused because misleading in their tendency.

5. There are, without doubt, cases of emergency, when no duty devolves upon one who is feloniously and forcibly assaulted by another with a deadly weapon, to decline combat by retreat. The instances must be few, however, and the evidence must be clear and free from all conflict, where the court, if ever, is permitted to make such a deduction. We have repeatedly declared the rule in effect to be, and the practice has commonly been, to submit to the jury, as a question of fact, the inquiry as to whether the party assailed could have conveniently and safely retreated without apparently putting himself at a probable disadvantage.—*Story's Case*, 71 Ala. 329; *DeArman's Case*, *Ib.* 351; *Tesney's Case*, at the present term; 3 Green. Ev. § 116; 1 Russ. Cr. 889. The last charge requested by the defendant was defective, in withdrawing from the jury, and devolving on the court, the determination of this inquiry. For this reason it was properly refused, if not also for other sufficient objections.

We discover no error in the record, and the judgment must be affirmed.

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Indictment for Murder.

1. *Special venire in capital case; who are "regular jurors" for the week.*—In summoning a special venire for the trial of a capital case, which must include the "regular jury," or "those summoned on the regular juries for the week" (Code, §§ 4872, 4874), these terms mean only those persons who were summoned as regular jurors and are in attendance; and neither those who failed to attend, nor those who were excused, nor talesmen, can be included, unless again specially summoned.

2. *Competency of juror, as affected by fixed opinion.*—A person summoned as a juror, who states, on his *voir dire*, that he has a fixed opinion as to the guilt of the defendant, which would bias his verdict, if the facts proved were as he had heard them, but, if the facts proved differed from what he had heard, he believed he would not be biased, but would act on the facts as proved, is not competent as a juror.—Code, § 4881. (The court is "unwilling to extend the rule in *Bales v. The State*, 63 Ala. 30.)

3. *Proof of character.*—A witness for the defense having testified to the general character of the deceased as a turbulent, violent, and dangerous man, he may be asked, on cross-examination, "if he had not heard some say that he was a kind and obliging man and a good neighbor;" but not, "if he had not heard men in his neighborhood say he was a kind neighbor;" nor, "if he had not heard some good reports about him;" the second question being too narrow and restricted, and the third too general.

4. *As to presumption arising from failure to adduce evidence, or to call witness.*—No presumption arises, unfavorable to the prosecution in a criminal case, from the failure to examine all the witnesses to the transaction, or every person to whom a dying declaration was made.

5. *Abusive words, or passion thereby excited, in excuse or mitigation of homicide.*—Mere words, however offensive, are not provocation sufficient to free a homicide from the charge of murder; nor can passion, excited by the use of such words, have any greater effect, though it is relevant to the question of malice, and may, in a proper case, reduce the killing to manslaughter; and under an indictment for murder, a conviction being authorized for any less offense necessarily included in that charged (Code, § 4904), charges asked, claiming an acquittal on account of such passion, are properly refused.

6. *Self-defense.*—The essential elements of self-defense, as established by repeated decisions of this court, are: 1st, that the defendant must be free from fault—must not say or do anything for the purpose of provoking a difficulty, nor be unmindful of the consequences, in this respect, of any wrongful word or act; 2d, there must be a present impending peril to life, or danger of great bodily harm, either real, or so apparent as to create the *bona fide* belief of an existing necessity; and, 3d, there must be no convenient or reasonable mode of escape, by retreat, or by declining the combat.

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FROM the Circuit Court of Pike.

Tried before the Hon. JOHN P. HUBBARD.

The defendant in this case, Stephen Jackson, was indicted for the murder of Joseph Bragg, by shooting him with a gun; was tried on issue joined on the plea of not guilty, convicted of murder in the second degree, and sentenced to the penitentiary for the term of ten years. When the case was called for trial, as the bill of exceptions states, "the defendant objected to being put on his trial, because he had not been served with a list of jurors, according to the order of the court in this case;" and he duly excepted to the overruling of this objection. During the impanelling of the jury, the defendant objected to the competency of one Jasper Johnson as a witness, on the facts stated by him on his examination *voir dire*; and he duly excepted to the overruling of his objection. The facts shown in connection with each of these rulings, so far as material, are stated in the opinion of the court. The defendant also reserved several exceptions to the rulings of the court on questions of evidence, which will be readily understood from the opinion of the court. The bill of exceptions purports to set out all the evidence adduced, but a statement of it is not necessary to an understanding of the points decided by this court. It was shown that, at the time of the fatal rencounter between the parties, the defendant, driving a yoke of oxen, came up the lane to the place where John Holmes and Dave Allen were plowing, and, being asked some questions by them, he stopped, put his gun down in a corner of the fence, got up on the fence, and was engaged in conversation with them, when the deceased came up the lane, walking towards his house; that he was accosted by the defendant as he passed, and some words passed between them about a hog, which the defendant had killed, and which was claimed by the deceased as his own; that the deceased drew his knife from his pocket, advanced towards the defendant, and attempted to pick up a fence-rail, when the defendant, who had got down from the fence, picked up his gun, and shot him twice; and, as the attending physician testified, the deceased died the next day from the effects of the second shot. The State introduced said John Holmes as a witness, but Dave Allen was not called. The State introduced Mrs. Mary Jane Holmes as a witness, who testified to dying declarations by the deceased as to the circumstances and details of the fatal rencounter; but two other persons who, according to her testimony, were present when these declarations were made, were not examined as witnesses.

The defendant requested the following charges to the jury, each of which was refused by the court, and exceptions duly reserved to their refusal:

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1. "If, at the time the fatal shot was fired, the defendant was in that condition in which the sway of reason was disturbed, and he was regardless of her admonitions by reason thereof, then he can not be convicted as charged in the indictment."

2. "Although the jury may believe that the defendant, when the deceased told him that he claimed the hog the defendant had killed, or that it was his, replied that he was a 'liar,' or a 'damned liar,' and said epithet was used under the influence of sudden resentment, and not for the purpose of bringing on a difficulty with deceased, in order that defendant might have a pretext to kill him, in furtherance of a design previously formed to do so; then, notwithstanding the use of such insulting words by the defendant, the deceased was not justifiable, in consequence thereof, in assaulting the defendant with a knife or a rail, if in fact he did so; and if he did so, defendant had a right to defend himself against said assault, to the extent necessary to save his own life, or his body from grievous bodily harm, provided there was no reasonable mode of escape known to him."

3. "If there were but two witnesses to the difficulty which resulted in the death of the deceased, and the prosecution has only called one of them, the presumption is, that the testimony of the other witness would not be favorable to the prosecution; and the jury would be authorized to predicate a reasonable doubt on the failure to introduce the other witness."

4. "Although the deceased had not made an assault on the defendant, yet, if the defendant acted under the reasonable belief that he was about to do so, and that he was in imminent danger of his life, or was about to suffer grievous bodily harm from the deceased, and was reasonably free from fault in bringing on the difficulty, and there was no reasonable way of escape, then the defendant is not guilty."

5. "If the jury find, from the evidence, that the defendant was, when the fatal shot was fired, in such a condition of mind that the sway of reason was disturbed, and he was unable to heed its admonitions; then the defendant can not be convicted as charged in the indictment, unless he brought on the difficulty with a view of having a pretense to kill the deceased."

6. "If the jury are reasonably satisfied that the deceased made other statements to his family, or to other persons, after the one made to Mrs. Holmes, and that such statements were known to the prosecution in this cause, and related to the circumstances of the killing; the suppression of such statements is a circumstance to be considered against the prosecution, and raises the presumption that the other statements would not correspond with the one adduced in evidence."

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7. "If the jury find that no sufficient reason or excuse has been shown why Allen was not called, and put on the stand as a witness for the prosecution, the presumption is, that his testimony would not be favorable to the prosecution, and the jury may reasonably predicate a reasonable doubt on such failure."

8. "The fact that Allen was not put on the stand by the prosecution, raises a strong presumption against the prosecution, provided no sufficient cause or excuse therefor is shown."

9. "If the fatal shot was fired in a passion, or in heat of blood, then it was not fired in malice."

GARDNER & WILEY, for the appellant, cited *Bales v. The State*, 63 Ala. 35; *Mitchell v. The State*, 60 Ala. 32; *The State v. Hill*, 34 Amer. Dec. 396; *The People v. Wellar*, 30 Mich. 16.

T. N. McCLELLAN, Attorney-General, for the State.—(1.) The defendant's objection to going to trial was, not to the special *venire*, but to the sufficiency of the copy served on the defendant.—*Brister v. The State*, 26 Ala. 107. If the objection had been to the *venire* itself, it was properly overruled, on the facts proved. (2.) That Johnson was a competent juror, see *Bales v. The State*, 63 Ala. 30. (3.) The evidence as to character was material, and the questions asked did not come within the rule. (4.) As to the charges asked and refused, the rulings of the court are sustained by *Mitchell v. The State*, 60 Ala. 28; *Flanagan v. The State*, 48 Ala. 703; *Boswell v. The State*, 63 Ala. 308; *Lewis v. The State*, 51 Ala. 3; *McGar v. Adams*, 65 Ala. 106; *White v. The State*, 72 Ala. 199.

CLOPTON, J.—The court made an order, setting a day for the trial of the cause, and commanding the sheriff "to summon one hundred persons, qualified citizens of this county, including those summoned on the regular juries for the week," and to serve a list of the jurors on the defendant, one entire day before the day set for the trial. When the case was called, the defendant objected to being put on trial, on the ground, that a list of the jurors had not been served on him according to the order of the court; and, in support of his objection, made known to the court that, in organizing the regular petit juries for the week, several, regularly summoned, did not appear, and others were excused. To supply the deficiencies, talesmen were summoned, and sworn in for the week. One of the talesmen left the court, without leave, on account of sudden sickness in his family, and another person was sworn in for the week in his stead. All these talesmen, except the one who had left the court, were included in the list of jurors deliv-

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ered to the defendant, as being on the regular jury, but were not otherwise summoned for the trial of the cause.

The statutes provide that "The court must make an order, commanding the sheriff to summon not less than fifty, nor more than one hundred persons, including those summoned on the regular juries for the week, or term, when the term does not exceed one week;" and that a list of the jurors summoned, including the regular jury, be delivered to the defendant, if in actual confinement, one entire day before the day set for the trial.—Code, §§ 2874, 2872. What persons constitute the regular jury, in the meaning of the statutes? At least twenty days before the day fixed by law for holding each regular term of the Circuit Court, the judge of probate, sheriff and clerk of the court, or a majority of them, must draw from the box containing the names of persons previously selected, as qualified to act as jurors, the names of the requisite number to serve as petit jurors, allowing thirty persons for each week of the term of the court. The statutes relating to the drawing and summoning of juries are declared to be merely directory. If, in consequence of the neglect of the officers, or from any other cause, no petit jury is returned to serve at any term of the court, or summoned for any week thereof, the court may, by an order entered on the minutes, direct the sheriff forthwith to summon the requisite number of persons to serve as petit jurors; and a jury thus organized is in all respects legal. When, by reason of challenges, or any other cause, it is rendered necessary to supply deficiencies on a regular jury, or to form one or more entire juries, if the occasion requires, the court may cause petit jurors to be summoned, either from the bystanders, or from the county at large. Jurors thus summoned are called talesmen, and must not be compelled to serve longer than the day for which they are respectively summoned, unless detained in the trial of an issue, or the execution of a writ of inquiry, submitted to the jury of which they are members, or unless re-summoned.—Code, §§ 4738, 4759, 4761, 4764.

Under the statutory provisions, persons who are summoned to supply deficiencies on the regular jury, cannot be compelled, except in the contingencies prescribed by the statute, to serve longer than one day, though they may be re-summoned from day to day, and such talesmen constitute no part of the regular jury. It is only in the event that no petit jury is returned or summoned for the term or the week, that a regular jury may be composed of persons summoned forthwith. When, therefore, the statutes use the phrases, "*including those summoned on the regular juries for the week,*" and "*including the regular jury,*" in respect to the trial of capital offenses, reference is had to those persons who have regularly been drawn and sum-

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moned, or who have been summoned forthwith when no petit jury is returned or summoned, and who are in attendance. Persons summoned as jurors for the week, who do not attend, or are excused, and talesmen, should be omitted from the list of jurors delivered to the defendant, unless such talesmen are specially summoned by the sheriff for the trial of the cause. This construction further appears from section 4878, which requires that, on the trial of a person charged with a capital offense, the names of the jurors summoned for his trial, and the names of the regular jurors in attendance, must be written on slips of paper, and put in a box, or substitute therefor, and drawn therefrom one by one. No names can be lawfully placed in the box, except of those persons summoned, and of the regular jurors *in attendance*. This was held to be the correct practice in *Posey v. The State*, 73 Ala. 490, where, speaking of the practice, it is said: "This leaves off such as were summoned and do not attend, such as have been excused, and all talesmen summoned to supply their places. * * * And if, by the ruling of the court, a juror is put on the defendant the law does not authorize, this is a reversible error."

2. The primary purpose of the common law, and of the statute which prescribes certain questions to be propounded to persons called as jurors on the trial of capital offenses, is to secure the guaranty of the constitution—"a speedy public trial by an impartial jury." Indispensable to the qualification of a juror is "freedom from bias, prejudice, passion, or interest." A just and proper administration of the law, having a due regard to the public safety and interests, as well as to individual rights, can not be obtained, other than by jurors competent to discharge the duties with honesty, impartiality, and intelligence. The statutory question is, Has the juror a fixed opinion as to the guilt or innocence of the defendant, that would bias his verdict? The juror, Johnson, in response to this question, stated, he had a fixed opinion as to the guilt of the defendant, which would bias his verdict, if the facts proved were as he heard them; but, if the facts proved differed from what he had heard, he believed he would not be biased, but would act on the facts as proved. The disqualification extends to those who, because of a previously formed opinion, are in a mental condition that incapacitates them to deliver such verdict as the evidence and the law may require. The opinion, to disqualify, must not only be fixed, but possessed of the fixedness which would bias the verdict, whatever might be the evidence and the law applicable to the case. An opinion formed on rumor, subject to change on hearing the evidence as given by the witnesses, and the law as pronounced by the court, leaving the juror free to weigh and consider impartially the

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whole evidence and the application of the law, is not such fixed opinion as disqualifies. While a juror should be above suspicion of bias or partiality, and while it is far preferable that no juror should have any previous opinion, such is impracticable, when crime necessarily becomes, more or less, the subject of discussion and common conversation. When, however, such previous opinion is so fixed that it will bias the verdict on the rumored facts being proved, the juror is not free to impartially consider and weigh the evidence *pro* and *con*, or to make an unbiased application of the law, as pronounced by the court, to the facts, if proved as heard. A juror, having such fixed opinion, is not the impartial juror guaranteed by the constitution. We are unwilling to extend the rule in *Bales v. The State*, 63 Ala. 30.

3. When general reputation becomes the subject of legitimate inquiry, the investigation should be directed in respect to the issues involved, and subserviently to their elucidation. On a charge of murder, the character of the deceased for violence, or blood-thirstiness, is admissible in evidence, when it tends to qualify, explain, or illustrate his conduct and the transaction. When a witness testifies to his general character, it is permissible, on cross-examination, to ascertain the opportunities, sources and extent of his knowledge, and the facts on which he bases his conclusion, that the jury may intelligently consider the sufficiency of his evidence. The inquiry in the present case was directed to the character of the deceased for peace. A witness for defendant having testified that his general character for peace was bad, and that he was regarded as a violent, turbulent, and dangerous man, the prosecution was permitted to ask the witness, on cross-examination, "if he had not heard some say that he was a kind and obliging man, and a good neighbor." While men of violent temper—dangerous, when excited by passion or revenge—may be, and often are kind and obliging, and good neighbors, these characteristics generally indicate a friendly and peaceable disposition. The evidence was properly admitted, that the jury might consider it, in connection with the other evidence, in determining the reasonableness of the conclusion of the witness as to the general reputation, or whether his violence and turbulence were of such degree that an act done by him would naturally create a quicker and stronger apprehension of imminent peril, than if performed by a man of different disposition, and authorize more prompt measures of defense. But the question asked the witness, Allen, "if he had not heard men in deceased's neighborhood say he was a kind neighbor," is too narrow in its scope, and too restrictive in its inquiry; and the interrogatory propounded to Robinson—"if he had not heard some good

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reports about deceased"—is irrelevant by reason of generality, unless followed by proof that the reports were in respect to his character for peace. The inquiries should be confined to those qualities which imply a peaceable disposition.

4. The general rule is, when evidence of an inferior degree is offered, the presumption arises, that the higher evidence is withheld for some improper purpose, unless its absence is satisfactorily accounted for. The rule ceases to operate, when no presumption of fraud, or of sinister purpose, can arise. It "does not demand the greatest amount of evidence which can possibly be given of any fact; but its design is to prevent the introduction of any which, from the nature of the case, supposes that better evidence is in the possession of the party." The rule has no application when all the evidence is primary; it applies to a substitution of secondary evidence for primary—of evidence of an inferior grade, for the best which the nature of the case admits of. All the law requires is sufficient proof; and a party is not bound to introduce all the witnesses to the facts. No presumption, unfavorable to the prosecution, arises from an omission to examine all the witnesses to the transaction, or each person to whom dying declarations were made. 1 Green, on Evidence, § 82; *Patton v. Rambo*, 20 Ala. 485.

5. By the statute, which extends the common-law rule, a defendant may be convicted of any offense which is necessarily included in that with which he is charged, whether it be a felony or a misdemeanor.—Code, § 4904. Murder embraces all the elements of manslaughter, and others. An indictment for murder, in legal effect, charges the defendant with every offense legally included in the offense of murder.—*Henry v. State*, 33 Ala. 389. As "words of reproach, how grievous soever, are not a provocation sufficient to free the party killing from the charge of murder," passion, to whatsoever extent aroused by opprobrious words, or abusive language, can have no greater effect; though it may be considered, in connection with the other evidence, on the question of malice, and may operate, in a proper case, to reduce the offense to manslaughter. The charges based on the mental condition of the defendant, at the time of the homicide, are equivalent to instructions, that, on the hypothesis of the charges, the defendant was entitled to an acquittal. The charges were calculated to mislead; and, moreover, the record does not set forth any evidence to which they are applicable.

6. The doctrine of self-defense has been so frequently considered by this court, that its essential elements may be regarded as beyond doubt or controversy. These are: 1. The defendant must be free from fault; that is, he must not say or do anything for the purpose of provoking a difficulty, nor must he

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be disregarded of the consequence in this respect of any wrongful word or act. 2. There must be a present impending peril to life, or of great bodily harm, either real, or so apparent as to create the *bona fide* belief of an existing necessity. And 3. There must be no convenient or reasonable mode of escape by retreat, or declining the combat.—*Story v. State*, 71 Ala 329: *DeArman v. State*, *Id.* 351: *Tesney v. State*, at present term.

We discover no error in the other rulings of the court.

For errors mentioned, the judgment is reversed, and cause remanded.

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Indictment for Grand Larceny.

1. *Confession, or admission implied from silence.*—The statement of the justice of the peace before whom the preliminary examination of the defendant was had, testifying as a witness on the trial, “that he explained the charge to the defendant, and asked him if he desired to make a statement; that, after defendant made his statement, witness told him his own statement would convict him, and defendant made no reply,”—is not a confession, or admission implied from silence, and is not competent evidence against the defendant.

2. *Larceny; constituents of offense.*—A conviction of larceny can not be had against a person who finds or picks up money which has been lost or dropped by the owner, unless there was a felonious intent contemporaneous with the finding or picking up, though it is not necessary that such intent should be established by positive testimony; but, if the defendant took the money from the person of the owner, or from any place in which he had put it, such taking being tortious, a felonious intent subsequently conceived and executed would constitute larceny.

FROM the Circuit Court of Tuscaloosa.

Tried before the Hon. S. H. SPROTT.

The indictment in this case charged, that the defendant feloniously took and carried away \$65 in money, consisting of silver coin, the personal property of J. T. Freeman. On the trial, as the bill of exceptions states, the prosecutor testified to the loss of his money, and the subsequent recovery of part of it, substantially as follows: On the 13th January, 1883, witness and the defendant travelled together in a wagon from their homes to Northport, the witness having with him about \$259.25; and on their return in the evening, they camped out together in the wagon about a mile out of town, no one being with them but a little boy. Witness paid several bills during the day, “and was drinking when he left Northport;” and he had with

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him, as he supposed, about \$67.70, consisting of silver dollars and small coins, which were tied up in a shot sack, and some of which had holes punched in them. "He awoke in the morning, about three o'clock, and missed his money. He felt about for it on his pallet, and, not finding it, asked defendant if he knew where it was; who replied, that he did not, and that witness had probably left it in Northport." They returned to Northport, but did not find the money, and then went home together. After the lapse of a few days, "witness got from a grocery-keeper some dimes with holes in them, which were like those he had lost," and which the defendant had spent at the grocery; and he then went to the defendant, and demanded his money. After some equivocation, the defendant said, "I got your money, but I did not mean any harm by it;" and he produced the sack, with the money in it, "from a gum behind his house." On counting the money, only \$46.25 was found in the bag; but the defendant, when asked for the residue, said that was all. Witness arrived at the sum which he said was in the bag (\$67.70), by adding up the bills he had paid, subtracting the sum from the \$259.25 which he carried to town, "and knocking off \$5 for what he might have spent while drinking." The State introduced one Long as a witness, "who testified, that he, as a magistrate, held the preliminary trial charging the defendant with grand larceny of the money; that he explained the charge to the defendant, and asked him if he desired to make a statement; that, after defendant had made his statement, he, witness, told him his own statement would convict him; to which defendant made no reply. The defendant declined to cross-examine this witness, but moved to exclude his evidence from the jury; which motion the court overruled, and the defendant excepted. The defendant introduced evidence tending to show that, on the way out to camp from Northport, the evening it was said the money was lost, he found the money in the road; that he saw said Freeman fall out of his wagon, and he picked up the money where Freeman fell out."

"This being substantially all the evidence in the case," the defendant requested the following charges to the jury: (1.) "If the jury believe, from the evidence, that there was no felonious intent at the time of the taking by the defendant, they must find the defendant not guilty." (3.) "If the jury believe, from the evidence, that the taking was open, and there was no subsequent attempt to conceal the property, and no denial, but an avowal of the taking, a strong presumption arises, that there was no felonious intent; which presumption can not be repelled, nor a conviction authorized, without clear and convincing evidence." (4.) "If the jury believe, from the evidence, that the defendant returned all, or any part of the money, to the owner,

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this is a circumstance tending to raise the presumption that there was, as to the part so returned, no felonious intent at the time of the taking." The court refused each of these charges, and the defendant excepted to their refusal.

WOOD & WOOD, and MARTIN & MARTIN, for the appellant.

T. N. McCLELLAN, Attorney-General, for the State.

STONE, C. J.—The witness Long testified, that he, as justice of the peace, presided in the preliminary trial of the accused, when the present prosecution was instituted. He was then permitted to testify, against the objection and exception of the accused, "that he explained the charge to defendant, and asked him if he desired to make a statement; that, after defendant made his statement, he, witness, told him, defendant, that his own statement would convict him, to which defendant made no reply." The legality of this evidence is attempted to be maintained, on the alleged ground that it is a confession, implied from silence. Confession of what? Not of any criminalizing fact in the case, for there is no proof of any fact, nor of any thing stated as fact. Giving it its full scope and import, it was, at most, the expressed opinion of the witness that defendant's own statement of the facts was, in itself, enough to convict him; and if defendant's silence be construed to be a confession, it can only be a confession that Long, the witness, believed defendant's statement of the facts to be sufficiently criminative to justify his conviction. It requires neither argument nor authority to show, that Long's opinion of the sufficiency of the evidence could not be the subject of legal testimony against the accused; and we can not perceive how defendant's confession that such was Long's opinion can transform it into legal evidence. Long testified to no fact stated by him to the defendant. Let us suppose the latter had attempted a reply, what would have been its form? To negative what had been said, he must have denied that such was Long's opinion, or denied that such opinion was justified by his, defendant's statement.

To come within the rule we have been considering, the statements must be made as of fact, pertinent to the issue, and such as would ordinarily elicit, or provoke a reply. They must be stated as of fact; for, as a rule, only facts, whether proved independently, or by admissions, can be given in evidence to a jury. The rule is correctly declared in the following authorities: 1 Greenl. Ev. §§ 197, *et seq*; *Fuller v. Dean*, 31 Ala. 654; *Bob v. The State*, 32 Ala. 560; *Campbell v. The State*, 55

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Ala. 80. The Circuit Court erred in admitting the evidence of the witness Long.

The testimony is somewhat indeterminate, as to how the defendant came into possession of the money alleged to have been stolen. If the money was dropped or lost by Freeman, and found or picked up by the defendant, then, to justify a conviction, it is necessary that there should have been the felonious intent contemporaneously with the finding or picking up; and unless the facts and circumstances in evidence convince the jury of this beyond a reasonable doubt, the defendant, on this hypothesis of the case, can not be convicted. This intent, however, need not be proved by positive testimony, but may be inferred from the circumstances, if sufficient. On the other hand, if the defendant did not find or pick up the money, but took it from Freeman's person, or from any place where he had put it, or from his bed where he lay, then the taking was a trespass, and it is not essential to his guilt that he should have had the intention to convert it feloniously at that very moment. Acquiring it tortiously, if he conceived and executed the purpose subsequently to convert the property feloniously to his own use, this would constitute larceny.—*Griggs v. The State*, 58 Ala. 425; *Clark's Manual*, §§ 940, 941; *McMullen v. The State*, 53 Ala. 531.

The first charge asked and refused was correct, on one hypothesis of the case, but not on the other. It was rightly refused. The third charge was supported by no testimony, and was, therefore, abstract. The fourth charge does not assert a correct legal proposition.

Reversed and remanded. Let the defendant remain in custody, until discharged by due course of law.

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Indictment for Perjury.

1. *Jurisdiction of justice of the peace, in criminal cases.*—While a justice of the peace is sitting for the trial of a case on its merits, whether civil or criminal, it may be that his court is one of limited or inferior jurisdiction, and that nothing will be intended to be within its jurisdiction except what affirmatively appears from the papers and proceedings in the cause; but, when the justice is sitting as an examining court, on the preliminary investigation of a criminal charge, this principle does not apply, and it is not necessary that his authority to act should affirmatively appear on the face of the proceedings, in order to support their validity when collaterally assailed.

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2. *Warrant of arrest, founded on coroner's inquest; justice of the peace acting as coroner.*—A warrant of arrest may be issued on the verdict of a coroner's jury (Code, § 3998), and a justice of the peace may act as coroner when that officer "is absent from the county, or unable to act" (Ib. § 4003); and when an inquest is held by a justice as coroner, a warrant of arrest founded on the verdict will support the jurisdiction of a committing magistrate, when collaterally assailed, no objection having been raised to the proceedings by motion to quash or otherwise, although it is not affirmatively shown that the coroner was absent, or unable to act.

3. *Admissibility of justice's proceedings as evidence.*—On a charge of perjury committed by the defendant while testifying as a witness during a preliminary investigation of a criminal charge before a justice of the peace, the original papers of the justice showing the proceedings are competent and admissible as evidence to identify them with the proceedings described in the indictment.

4. *Proceedings of justices on preliminary investigation, when acting outside of beat, or one is incompetent to sit.*—When a justice of the peace issues a warrant of arrest, returnable before himself, he may associate with him, on the trial of the preliminary investigation, "one or more magistrates of equal grade" (Code, § 4693); and it is no objection to the validity of their proceedings when thus sitting, that the associate justices are acting outside of their respective beats or precincts; nor are their proceedings void, because one of the associates was incompetent to sit.

5. *Judgment and sentence; asking defendant if he has aught to say before.*—A recital in the judgment-entry, that the defendant was asked, before judgment and sentence was pronounced on him, "if he had anything to say why the judgment of the court should not now be pronounced upon him," shows a substantial compliance with the requirements of the law.

FROM the Circuit Court of Jefferson.

Tried before the Hon. S. H. SPROTT.

The indictment in this case charged, that the defendant, Tom Boynton, "on his examination as a witness, duly sworn to testify, on the trial of Samuel R. Truss and D. H. Brown, charged with the murder of Frank Jackson, on trial for commitment before H. F. Fancher, N. J. Dison, and John Vary, who were presiding and sitting as a magistrates' court, and which court had authority to administer such oath, falsely swore that *Mr. Truss* (meaning thereby one of the defendants) *said, 'I was sure I got one of them'; and further said, 'I got the last one'; and further said, that the first one made such a dust he* (referring to said Truss) *could not see him*; the matters so sworn to be being material, and the testimony of said Tom Boynton being wilfully and corruptly false." The several points here presented for revision, with the material facts relating to them, are stated in the opinion of the court.

R. H. PEARSON, for the appellant.

T. N. McCLELLAN, Attorney-General, *contra*.

SOMERVILLE, J.—The defendant is charged with the offense of perjury, alleged to have been committed in his rendi-

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tion of testimony as a witness before a justice's court on preliminary investigation.

The main ground of defense urged in the cause is, that these proceedings before the magistrate were void for want of jurisdiction.

1. It may be that, when a justice of the peace sits for the trial of a cause on its merits, whether the proceeding be civil or criminal, his court is one of limited or inferior jurisdiction, and that nothing will be intended to be within his jurisdiction, except what specially appears to be so from the papers and proceedings in the cause. But this rule has no application to proceedings before a justice when he sits as an examining court, on mere preliminary investigation of a criminal charge. It is true that, under the constitution and laws of this State, no warrant of arrest can issue for the seizure of any person, without the oath or affirmation of some one alleging probable cause; and without such an accusation, no preliminary proceedings for the purpose of commitment are contemplated by the statute. Code, 1876, §§ 4651 *et seq.* We have no reference, of course, to the magistrate's power to commit for criminal acts done in his presence. Every justice of the peace in this State is made by law a conservator of the peace, and this function is an ancient jurisdiction conferred by the common law upon all justices. It always involves the power of suppressing riots and affrays, taking securities for the peace, and of apprehending and committing criminals.—1 Black. Com. 424; 1 Bish. Cr. Proc. (3d Ed.), § 225. It is more regular, of course, and therefore advisable, that, even in these matters, where the justice undertakes to act, his authority should appear upon the face of the proceedings; but it is not necessary, in order to raise a presumption of jurisdiction on collateral attack. "Justices of the peace," says Mr. Bishop, "being the ordinary committing force of the country, the presumption should be in favor of their jurisdiction, the same as in favor of the superior courts doing the general judicial business."—1 Bish. Cr. Proc. (3d Ed.), §§ 23, 228, *et seq.*

2. The alleged defect in the justice's proceedings is, that the warrant of arrest was based on no sufficient accusation; the argument being that, although the statute authorizes such a warrant upon the verdict of a coroner's jury of inquest, duly sworn, and there was what purports to be such an inquisition in the present proceedings, yet they show that the justice acted as coroner, and he had no power to do so, under the statute, unless the regular coroner was "absent from the county, or unable to act," which is not shown affirmatively to have been the case. Code, 1876, § 4003. The investigation having taken place without objection, or without motion to quash the proceedings, we must, on the principle above mentioned, assume that fact

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existed which was necessary to sustain the jurisdiction of the magistrate's court.

3. The papers in these proceedings before the magistrate were clearly admissible in evidence, for the purpose of showing the identity of the proceedings with those described in the indictment—a fact which could be proved in no other way, under the circumstances.—*McMurry v. The State*, 6 Ala. 324.

4. The contention that the proceedings were absolutely void, because one of the three magistrates who sat upon the trial was incompetent, can not, in our judgment, be sustained. Two of these officers, Fancher and Dison, were unquestionably competent to sit in the cause, either one of them alone constituting a legal examining tribunal for the purpose of such a trial. It was no objection to them, that they were holding their court out of their beats or precincts, because justices of the peace, in this State, have a criminal jurisdiction in such matters co-extensive with their counties.—Code, 1876, §§ 4628, 4632, 4663. The warrant had been issued by Fancher, and made returnable before himself. The statute conferred on him the authority to "associate with himself one or more magistrates of equal grade," by whom, in connection with himself, the investigation was to be judicially conducted.—Code, 1876, § 4693. This power he had exercised by calling in Dison, and one Vary. Conceding that the latter was incompetent to sit, because he was a notary public, appointed by the Governor, and therefore empowered to exercise *ex officio* the jurisdiction of a justice only within the ward for which he had been appointed, in the city of Birmingham, we do not think this fact would vitiate the proceedings of the examining court, so as to render them void for want of jurisdiction. We need not say that this state of facts would not present an error or irregularity for which a judgment would be reversible in a proceeding from which an appeal would lie. The proceedings could be pronounced absolutely void, only on the ground that the association of an incompetent person—one not authorized to act as a justice in the particular precinct—would take away or abrogate the jurisdiction of the others, who alone, either one or both, could have lawfully sat in the cause, and administered the oath taken by the defendant. There is no presumption that the one incompetent justice dominated the judgment of the other two. His sitting must be regarded as advisory only, not detracting from the existing jurisdiction of the others; and, however vulnerable the proceeding might be on direct attack, in cases where this is allowable, it is not void when collaterally assailed, as in the present case. The law should greatly favor the validity of judicial proceedings, and sound policy is repugnant to presumptions which magnify irregularities, and necessitate the declaration of

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the nullity of such proceedings, except under circumstances most clearly justifiable.

5. The judgment-entry shows with sufficient certainty that the defendant was properly interrogated before the sentence of the law was pronounced on him by the presiding judge. He was asked "if he had any thing to say why the *judgment of the court* should not now be pronounced upon him," and to this he said nothing. This was sufficient, as it was by the judgment of the court that the sentence of the law was pronounced. *Speigner's Case*, 58 Ala. 421.

We find no error in the record, and the judgment of the Circuit Court is affirmed.

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Indictment for Murder.

1. *What witness, testifying negatively as to words used, may state as to his position.*—A witness who was present at the rencounter between the defendants and the deceased, and who testifies that he did not hear the deceased curse or swear as he rode up to the place where the others were, as another witness testified he had done, may further state that he was in such position at the time that, if the words had been used, he could have heard them; being subject to cross-examination as to the particular facts, which would show to what weight his testimony was entitled.

2. *Defendant's declarations; when admissible as evidence for him in rebuttal.*—Who brought on the difficulty being a controverted question of fact, and the prosecution having adduced evidence tending to show that the defendant went to the place for the purpose of killing the deceased; it is permissible for the defendant to show, in rebuttal, his refusal to go to the place when first asked, the reasons assigned at the time for his refusal, and the circumstances under which he went soon afterwards.

3. *Experts, as witnesses.*—Whether a witness possesses the necessary qualifications to testify as an expert, is a preliminary question addressed to the court, and much must be left to its discretion; and if the witness be competent as an expert, he may state his opinion, and detail generally the facts on which it is based.

4. *Proof of distance between parties when shot was fired.*—For the purpose of showing the distance between the parties when the deceased first fired a pistol at the defendant, as indicated by the marks of powder on the clothes, or the want of such marks, it is not permissible to exhibit to the jury a coat similar to that worn by the defendant at the time, and show the effect of a single experiment in firing at it.

5. *Proof of character of deceased.*—As tending to show the character of the deceased as a turbulent and violent man, a witness may be asked if he had not heard that the deceased, a short time before he was killed, had "had several rows and shooting scrapes in another county."

6. *Self-defense.*—The decisions of this court, as to the doctrine of self-defense, have settled these principles: that, to excuse the taking of human life, there must exist a present, pressing necessity to prevent the

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commission of a felony, or the infliction of great bodily harm, or such apparent necessity as would create, in the mind of a reasonable and prudent man, a belief that such necessity actually existed; that the defendant, if he was the aggressor, or was instrumental in bringing on the difficulty, is precluded from setting up the plea of self-defense; and that, if the deceased was the assailant, the defendant must have retreated, unless retreat would have endangered his safety, or there was no reasonable mode of escape.

7. *Same; charge as to.*—A charge which instructs the jury that, “before the defendant can successfully set up the plea of self-defense, he must show a pending and pressing necessity to strike,” is erroneous, because it ignores the sufficiency of an apparent necessity.

8. *Presumption of malice from use of deadly weapon.*—The use of a deadly weapon, from which the law infers malice, casts on the defendant the *onus* of disproving it, unless the presumption is rebutted by the proved circumstances attending the killing; but the presumption may be rebutted by other evidence than that which proves the killing.

9. *Charge objectionable for generality, or tending to mislead.*—A charge given, which asserts a correct legal proposition, though objectionable on account of its generality, or because tending to mislead the jury, is not a reversible error; the party complaining of it should protect himself by asking a qualifying or explanatory charge.

10. *Charges requested, tending to mislead, or ignoring material facts.* A charge requested, which, when applied to the evidence, has a tendency to mislead the jury, or withdraws from their consideration any material fact which the evidence tends to establish, is properly refused.

FROM the Circuit Court of Walker.

Tried before the Hon. S. H. SPROTT.

The indictment in this case charged that the defendants, Green Tesney and William L. Tesney, unlawfully and with malice aforethought killed George King, “by stabbing or cutting him with a knife,” or, as alleged in the second count, “with some sharp instrument, to the grand jury unknown.” Being arraigned, the defendants each pleaded not guilty, and they were jointly tried on issue joined on that plea; each being convicted of murder in the second degree, and sentenced to the penitentiary, Green Tesney for the term of twenty-five years, and William L. Tesney for twelve years.

The bill of exceptions purports to set out “substantially all the evidence in the case,” but does not state it in the order in which it was introduced; and in stating the various objections to evidence, it is impossible to state what evidence was already before the jury. It was shown that the killing occurred in said county, about sunset, on the evening of December 16th, 1881, at a store kept by W. R. King, the father of the deceased; the defendants, with one John Tipper, having stopped there a short while before the deceased, with his two brothers, rode up and alighted; and as the deceased entered or approached the store, he was caught or stopped by Green Tesney, whom he shot with a pistol, and by whom he was stabbed seven or eight times with a common pocket-knife. The evidence for the prosecution “tended to show that the defendants had gone to said store, on

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the evening of the difficulty, with the intention of killing George King, the deceased ; while the defendants' evidence tended to show that they had gone there on legitimate business, and with no unlawful purpose. The testimony of the State tended to show that Green Tesney killed the deceased maliciously and unlawfully, and that William Tesney aided and abetted him in the killing ; while the evidence offered by the defendants tended to show that, when Green Tesney inflicted on the deceased the mortal wound or wounds, the deceased was attacking or assaulting him with a pistol ; and that Green Tesney had not provoked the difficulty, and was not at all in fault ; and that William Tesney did nothing in aid of his brother to encourage him in the killing ; and that Green Tesney inflicted the mortal wound or wounds on the deceased in the necessary defense of his life, or to save himself from great bodily harm."

W. R. King, the father of the deceased, a witness for the prosecution, "having testified, on his direct examination, that he did not hear George King curse or swear as he rode up, just before the difficulty, to the store where Green Tesney was standing ; the defendants asked him, on cross-examination, 'Were you in a position where you could have heard George King curse or swear, if he had done so, as he rode up to the store ?' The State objected to this question, on the ground that the witness ought to state his own position and that of George King, and let the jury determine whether he was in a position to have heard ; which objection the court sustained, and the defendants excepted."

"The defendants offered to prove, by said John Tipper, that when he and William Tesney proposed to go by the house and store of said W. R. King, the evening on which George King was killed, Green Tesney refused to go by with them, remarking that he did not want to go because George King did not like him, and told them to hurry up, and that he would wait for them at the forks of the road. The State objected to this evidence, and the court sustained the objection ; to which ruling the defendants excepted. Said W. R. King had testified, that William Tesney told him Green Tesney was at the forks of the road, and asked him if he would have a friendly conversation with Green ; that he said he would, and thereupon William Tesney went after Green, and brought him to the store."

The defendants offered Dr. Camack as a witness, who had been called in to dress the wound of Green Tesney, and who, after describing its location and character, further testified, "that he had examined the clothes of Green Tesney, to discover if there were any signs or indications of powder about them, or of powder-burns, and that he could discover none. He testified, also, that he had practiced medicine and surgery

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for fifteen years, had handled fire-arms very frequently, and was skilled in their use, especially in the use of a pistol. The defendants asked said witness, if George King's pistol was against the body of Green Tesney, or within six inches of it when the pistol was fired, whether or not there would have been signs or indications of powder or powder-burns about the clothing of said Tesney when he made the examination that night. The State objected to this question, on the ground that said witness did not pretend to have any more knowledge than any other person, as to powder-burns, or stains from the firing of a pistol ; which objection the court sustained, and the defendants excepted. The evidence which had been introduced by the State tended to show that, when said King shot Green Tesney, King was lying on the ground, and Green Tesney was on him, and the muzzle of the pistol was against Green Tesney's body, or within five or six inches ; while the defendants' testimony tended to show that King shot said Tesney from his horse, and while Tesney was three or four paces distant. The defendants then asked Dr. Camack this question : ' If it was his opinion that the pistol which wounded Green Tesney was fired from a position above him, or not.' The State objected to this question, and the court sustained the objection ; to which ruling the defendants excepted. The State offered John King as a witness, in rebuttal, and asked him, if he had ever shot, or seen a pistol shot, at a dark woollen coat, within four or five inches of it ; and the witness was allowed by the court to state, against the objection of the defendants, that he had that morning, at the instance and request of the solicitor, procured a dark woollen coat, similar in appearance and color to that worn by Green Tesney at the time of the difficulty, and had taken the pistol said Tesney was shot with, and, in the presence of others, had shot within four or five inches of the coat, and that there was no sign or mark of powder-burn about it. The witness produced the coat, and it was shown to the jury, against the objection of the defendants ; and the defendants excepted."

"The State offered Carter Scott as a witness, in rebuttal, to prove that the general character of said George King was not that of a dangerous or turbulent man, the defendants having introduced evidence to the contrary ; and the witness said, that it was not. The defendants asked said witness, on cross-examination, if he had not heard of said King, a short time before he was killed, going over into Winston county, and having several rows and shooting scrapes over there. The State objected to this question, and the court sustained the objection ; to which the defendants excepted."

"The court charged the jury, on the subject of self-defense, as follows : ' It is true that a man has a right to strike in self-

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defense, even to the taking of life, in order to save his own life, or to prevent grievous bodily harm, or to prevent the commission of a felony. But self-defense can only be interposed when the defendant was without fault in provoking or bringing on the difficulty, *and there was no other reasonable mode of escape.* If a defendant provokes or brings on a difficulty, or enters willingly into a mutual combat, *or if he can retreat without increasing his danger, he can not set up self-defense.* It is the duty of the defendant, in order to avoid taking life, to retreat, *if he can do so with reasonable safety.* If it comes to a question, *as to whether one man shall flee or another shall live, the law decides that the former shall flee, rather than the latter shall die.* The defendants excepted to this charge, and especially to" the several italicized portions.

The defendants excepted, also, to several charges given by the court on the request of the solicitor, among which were the following: (2.) "A weapon, not deadly in itself, may become a deadly weapon, according to the manner in which it is used, the force used, and the place upon which it is used. A common pocket-knife, used with force in stabbing another in a vital part, and which results in immediate death, is a deadly weapon." (3.) "If Green Tesney unlawfully killed George King with a deadly weapon, the law will adjudge him guilty under this charge, unless the evidence which proves the killing rebuts the presumption of guilt." (6.) "Before a defendant can set up the plea of self-defense successfully, he must show that there was a pending and pressing necessity to strike, that there was no reasonable mode of escape to avoid the difficulty, and that he was without fault in bringing on the difficulty."

HEWITT, WALKER & PORTER, for the appellants.

T. N. McCLELLAN, Attorney-General, for the State.

CLOPTON, J.—Whether the witness, W. R. King, was in such position that he could have heard the deceased curse or swear, when he rode up to the store, if he had done so, may be said, in one sense, to be an opinion, but, in another sense, it is a fact; as said by Mr. Wharton, a "mere short-hand rendering of the facts." On cross-examination, the relative positions of the parties, the distance from each other, and other attendant circumstances, could have been elicited, from which the jury might infer the weight to which his answer was entitled. A controverted question in the case was, who provoked or brought on the difficulty? The witness had already testified, that he did not hear the deceased curse or swear, as he rode up; while there was other testimony tending to show that he did. It

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was competent for the defendant to show that the witness was not in a position to hear.

2. As tending to show the motive which moved the defendant, Green Tesney, to go to the store, and as tending to cast some light on the controverted question, by whom the difficulty was brought on, the court should have permitted the defendant to show his refusal to go to the store, and his reason for refusing, as then stated. The prosecution had introduced evidence tending to show that the defendant went to the store for the purpose of killing the deceased. It was permissible for the defendant to rebut this evidence, by proving his refusal to go, and the circumstances under which he did go subsequently. Acts and declarations, occurring so shortly before the main fact, as to be directly connected with it, and to exclude the idea of fabrication or design, may be regarded as contemporaneous; and are admissible, if pertinent to the issue, and tending, though dimly, to elucidate the controverted matters. The sufficiency of the evidence is addressed to the jury.

3-4. Whether a witness possesses the necessary qualifications to testify as an expert, is a preliminary question addressed to the court, and much must be left to the discretion of the presiding judge. The jury, having the facts, were as competent to form an opinion as to the position of the deceased when he fired the pistol, as a physician. The witness did not show that he had any experience in respect to the requisite proximity of a pistol to leave signs or indications of burnt powder on the clothing. A person may be skillful and experienced in the use of fire-arms, and have no observation or experience in respect to the particular matter inquired about.—*Weaver v. Ala. Coal Min. Co.*, 35 Ala. 176. But the court erred in permitting evidence of the result of a solitary experiment of firing at a coat similar to the one worn by defendant, and the exhibition of the coat to the jury. Such evidence superinduces the mischief of trying a collateral controverted matter by proving separate and distinct experiments, with results as variant as the manner of loading the pistols, and the modes of making the experiments, dependent more or less on the wishes and feeling of the person making them, and tends to confuse the jury, and withdraw their minds from the consideration of the main issue. The witness, if an expert, may give his opinion, and detail generally the facts on which it is based; whereby the value of the opinion, and of the evidence on which it is founded, is submitted to the jury.—*McCreary v. Turk*, 29 Ala. 244.

5. There was error in refusing to permit the defendants to ask the witness Scott, on cross-examination, if he had not heard that the deceased, shortly before he was killed, had several rows

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and shooting scrapes in Winston county. The relevancy and competency of the evidence was expressly ruled in *DeArman v. State*, 71 Ala. 351.

6. The circumstances, under which the accused may invoke the plea of self-defense, have been well and uniformly settled by our decisions. To excuse the taking of life, there must exist a present, pressing necessity to prevent the commission of a felony, or of great bodily harm, or such apparent necessity as would create in the mind of a reasonable, prudent man a belief that it actually existed. If the accused is the aggressor, or is instrumental in bringing on the difficulty, he is precluded from setting up self-defense. He can not avail himself of a necessity brought about, or created by himself. If the deceased is the assailant, the party assailed must retreat, unless retreat will endanger his safety, and must refrain from taking life, if there is any other reasonable mode of escape.—*Brown v. State*, 74 Ala. 478; *Wills v. State*, 73 Ala. 362; *DeArman v. State*, 71 Ala. 351; *Eiland v. State*, 52 Ala. 322. The general charge of the court, on the doctrine of self-defense, accords substantially with these principles.

7. The charge given at the request of the solicitor, that "*before a defendant can set up the plea of self-defense successfully, he must show a pending and pressing necessity to strike*," is too narrow and restricted. It ignores the sufficiency of an apparent necessity.

8. Whether a particular weapon used is deadly or otherwise is, in many cases, a question for the jury, to be determined from the description of the weapon, the manner of its use, the nature and locality of the wound, and the other circumstances proved. An ordinary pocket-knife may be a deadly weapon. *Sylvester v. State*, 71 Ala. 17. There was error, however, in charging the jury, that if the defendant killed the deceased with a deadly weapon, the law will adjudge him guilty, unless the evidence which proves the killing rebuts the presumption of guilt. The accused may rebut the presumption of malice, arising from the use of a deadly weapon, by evidence other than that introduced to prove the killing. The use of a deadly weapon, from which the law infers malice, casts on the defendant the *onus* of disproving it, unless the proved circumstances attending the killing rebut the presumption.

9. The other charges, given at the request of the solicitor, assert correct legal propositions; and if considered objectionable, because of their generality, or because calculated to mislead the jury, qualifying or explanatory instructions should have been asked.

10. Charges should be framed in reference to the evidence; and if their tendency is to mislead, or they withdraw from the

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consideration of the jury any material fact, which the evidence tends to prove, they may be properly refused. The first three charges requested by the defendants omit from the facts hypothetically stated either the freedom from fault in bringing on the difficulty, or willingness to enter into combat, or the ability to retreat without endangering safety. The others are argumentative.

From an application of these principles to the different phases of the case, as presented by the record, it results: If the defendant, Green Tesney, went to the store with the intention, and for the purpose of provoking a difficulty, and did provoke, or was instrumental in bringing it on; or if he went there without such intention or purpose, and willingly entered into the fight, when he could have reasonably avoided the same, and, during its progress, inflicted the mortal wounds intentionally, and William Tesney aided and encouraged him, the defendants are guilty of murder, or manslaughter, as the jury may find that the killing was with or without malice. If, however, the defendants went to the store with peaceful intentions, and for a legitimate purpose, and the deceased, on riding up and discovering who Green Tesney was, attacked him with a pistol, so suddenly, and in such perilous proximity, that an attempt to retreat would have endangered his safety; and he struck the fatal blow under a present pressing necessity to prevent great bodily harm, or a reasonable apprehension that such necessity existed, and was without fault in bringing on the difficulty, they are not guilty of any criminal offense.

The jury must be satisfied beyond a reasonable doubt—not a capricious or fished doubt, but a doubt from which the mind is not reasonably free—of the truth of every material fact, necessary to the guilt of the defendant. If they entertain a reasonable doubt as to any such fact, or whether the killing was in self-defense, construed by the principles we have stated, the defendants are entitled to an acquittal.

We discover no error in the other rulings of the court.

Reversed and remanded. Defendants will remain in custody, until discharged by due course of law.

[Miller v. The State.]

Miller v. The State.*Indictment for Burglary.*

1. *Burglary in breaking and entering corn-crib; proof of value of corn, and charge as to.*—That the use of corn as food for horses and mules constitutes value, is a fact which all men are presumed to know; and the court may charge the jury, that they may conclude the corn was valuable, if the proof shows that it was used to feed horses or mules; and circumstantial proof being sufficient, if strong and convincing to the satisfaction of the jury, may refuse to instruct them that the fact that the corn had value must "be positively proved by the evidence."

2. *Same; breaking and entering, as element of offense.*—The corn having been abstracted from the crib by the defendant, by thrusting his arm through an opening between the chinks, if he made or enlarged the opening for the purpose, this would constitute a sufficient breaking as an element of burglary; but, if the opening was neither made nor enlarged by him, though he thrust in his arm and took out the corn, and might thereby be guilty of larceny, he would not be guilty of burglary.

3. *Sentence to hard labor for costs; correction of clerical error.*—A sentence to hard labor for non-payment of costs, in a criminal prosecution for a misdemeanor, can not exceed eight months, nor fifteen months in a case of felony (Sess. Acts 1880-81, p. 67); but a sentence beyond this limit, being a clerical error, will be corrected by this court, if the record contains no other error.

From the Circuit Court of Madison.

Tried before the Hon. H. C. SPEAKE.

The indictment in this case charged that the defendant, George Miller, with intent to steal, broke into and entered a corn-crib of John Fanning, a building specially constructed to hold or keep corn, and in which corn, a thing of value, was at the time kept for use. The defendant pleaded not guilty, and was tried on issue joined on that plea; and being convicted, he was sentenced by the court to hard labor for the county for one year, and to an additional term of 469 days for the non-payment of the costs, which were taxed at \$140.50. On the trial, as appears from the bill of exceptions, the prosecution proved by one Davis, who was a tenant of John Fanning, that when he went to the stable on Tuesday morning, June 27th, 1876, about day-light, "it being light enough for him to see something white under the trough in which his horses were eating," he shoved his foot under the trough, and found it was the defendant, who had a sack on the ground containing about a half-bushel of corn; that he thereupon arrested the defendant, carried him to his house, and kept him there for several hours, until the arrival of a constable for whom he had sent.

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As to the character of the building, the ownership of the property, &c., this witness further testified: "There was a shed around the crib with a door to it, and witness used the shed as a stable for his mule. He rented the land from Mr. Fanning where the crib and stable were. He used the stable while Mr. Fanning used the crib to keep corn in. There was about forty or fifty bushels of corn in the crib at the time. Mr. Fanning kept the key of the crib, and furnished and fed the mules, and they farmed on equal shares. Whenever witness wanted corn for his mules, he would tell Mr. Fanning, who would put corn enough in the little crib (which was near this big one) to feed his mules for several days. The crib was chinked around. Witness noticed, on the morning he caught defendant in his stable, that some of the chinks had been taken out of the crib above the horse-trough, and some of the back had been knocked off the log. The chinks were about two or three inches thick, and a foot or more in length. Witness had never noticed any holes in the crib, or chinks taken out, before that morning; and the chinks were not taken out the evening before, when he went in and fed his mules. The hole was large enough for him to put his hand in." The witness testified, also, that corn was then selling in the neighborhood at forty cents per bushel. Said Fanning, the owner of the crib, also testified substantially to the same facts as to the ownership of the property, the contents of the crib, and the contract between him and Davis as to the cultivation of the land; and he further testified to confessions voluntarily made to him by the defendant, on the morning of his arrest, when brought into his presence by the constable. The defendant introduced evidence tending to show that, at and about the time of the commission of the alleged offense, he had been selling meal for said Davis, and taking corn in payment; that Davis owed him four bushels a few days before, and delivered a sack in payment, telling him to send or come for the balance if the sack did not contain that quantity; that the sack contained in fact only about three bushels, and he sent word to that effect to Davis; and that he left home on said Tuesday morning, after day-light, with the avowed purpose of going for the bushel of corn which Davis owed him. These facts were proved by the testimony of the defendant's own children, whom he introduced as witnesses, and in the statement which he himself made to the jury; and he further stated, "that the said Davis took the ears of corn from the crib, through a crack between the logs, and put them in the sack while defendant held it open."

The bill of exceptions purports to set out all the evidence, and the above is the substance of it. Thereupon, the court charged the jury as follows: "That an article has value,

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may be proved by the uses to which it is put; and if the proof shows to the jury, beyond a reasonable doubt, that said corn was used to feed horses or mules, they must conclude that the corn was valuable." The defendant excepted to this charge, and then requested the following charges, which were in writing, and each of which was refused by the court: (1.) "The ownership of the building alleged to have been broken into and entered must, under this indictment, be proved beyond a reasonable doubt to be in John Fanning; and if the jury should find, from the evidence, that the ownership of said building was in said Fanning and said Davis jointly, their verdict is bound to be in favor of the defendant." (2.) "If the jury believe, from the evidence, that the building of which the crib was a part, from which the corn is alleged to have been stolen by the defendant, was in the joint use of said Fanning and said Davis, and was used by them for their mutual convenience, then they must find the defendant not guilty." (3.) "The jury can not take it for granted that the corn was of value, unless it is positively proved by the evidence." (4.) "If the jury are in doubt, as to whether any evidence has been introduced touching the value or worthlessness of the corn alleged to have been kept in the crib, which the defendant is charged to have broken into and entered, they must not consider any fact of which they doubt whether such evidence has or has not been given." (5.) "If the jury find, from the evidence, that the entrance to the corn-crib, through which the corn was taken, was effected through an opening previously made there by Davis, and not by the defendant, this is not a burglarious entrance by the defendant, and the jury must acquit him." To the refusal of these several charges the defendant duly excepted.

W. L. CLAY, and GEO. S. GORDON, for appellant.

T. N. McCLELLAN, Attorney-General, for the State.

STONE, C. J.—There was certainly testimony in this case that the corn had value. Use as food for horses and mules, constitutes value, as all men must be presumed to know. But there was evidence that corn, in that neighborhood, was worth fifty cents a bushel, and that there were in the crib from one hundred and fifty to two hundred bushels of corn. If this testimony was believed, there was ample evidence of value. The Circuit Court did not err in the affirmative charge given, nor in refusing to give charges three and four asked by the defendant. There being proof that corn had value, there is no rule of law that that fact, any more than any other, shall be "positively proved by the evidence." Circumstantial evidence is sufficient,

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if strong and convincing enough. Charge four was rightly refused, because it is both abstract and involved. So, charges one and two are abstract, for there is no testimony that Davis had any ownership or use in the crib. They were rightly refused on that account, if for no other.—*M. & E. Railway Co. v. Koll*, 73 Ala. 396; 1 Brick. Dig. 338, § 41.

2. The testimony of the witness Davis tended to show, that the defendant removed the filling or obstruction which had been placed in the chinks of the crib, and thereby effected an opening, through which he thrust his arm, and by that means abstracted the corn he is charged with intending to steal. This, if true, would be a sufficient breaking, to constitute that element of the crime of burglary. The defendant testified, that he did not remove the obstruction, but that it had been previously removed, and the opening was there when he went there. He also testified, that Davis himself took the corn out of the crib. Now, if the defendant removed nothing, and neither effected nor enlarged the opening through which the corn was taken out, then he was not guilty of burglary, even though he thrust his arm in, and took out the corn. His act, in such event, might be larceny. The fifth charge, asked by defendant, raises this question. It claimed an acquittal, on the hypothesis of defendant's statement of the facts in the case. On that hypothesis, he would not be guilty of burglary; for, to constitute that crime, there must be both a breaking and entering, as well as the intent to steal, or to commit a felony.—3 Green. Ev. §§ 88, 76, *et seq.*; 2 Russ. on Crimes, 9th Ed., 2; *Pines v. State*, 50 Ala. 153; *Brown v. State*, 55 Ala. 123; *Walker v. State*, 63 Ala. 49.

3. There is an error in the judgment for costs. The sentence to hard labor for the non-payment of costs, can not now exceed eight months in cases of misdemeanor, and fifteen months in cases of felony. The sentence in this case exceeds fifteen months.—Sess. Acts, 1880-81, 37. This error being clerical, if the only one in the record, would have been here corrected.

Reversed and remanded.

[Lewin v. The State.]

Lewin v. The State.

Prosecution for default in Working Public Road.

1. *Exemption from duty to work public road: employee of Alabama Insane Hospital.*—A person can not claim exemption from the duty of working on the public roads (Sess. Acts 1876-7, p. 135), on the ground that he is an employee of the Alabama Insane Hospital (Code, § 1500), when he does not show that he was engaged in that capacity at the time he was notified or summoned to work on the road.

2. *Same; members of incorporated fire-company.*—An active member of an incorporated fire-company, whose charter exempts its members "from military duty, road-tax, and performance of jury duty," is exempt from the statutory duty of working the public roads; the word "road-tax" being construed to mean road-duty, since otherwise it would have no field of operation.

FROM the Circuit Court of Tuskaloosa.

Tried before the Hon. S. H. SPROTT.

This prosecution was commenced before a justice of the peace, and was removed into the Circuit Court by appeal, where it was "submitted on the following agreed statement of facts in writing: The defendant was living just outside (about a quarter of a mile) of the corporate limits of Tuskaloosa, and was an employee of the Alabama Insane Hospital, about one mile from the city limits. At the time he was warned to work the public road, he was an active member of Tuskaloosa Fire Company No. 1, and had, for three years, been attending the meetings and fire-alarms in said city, as the other regular members of said company. Defendant was regularly and legally warned, by the proper person, to work the proper public road in Tuskaloosa precinct, on which he lived, and near his residence; and he refused to work the road for four and a half days, claiming his exemption by virtue of being a member of said fire-company. The above was all the testimony in the cause. The court charged the jury in writing, at the instance of the State, as follows: 'The facts are agreed upon, and if the jury believe the evidence, they will find the defendant guilty, and assess such fine as they see proper, not less than one dollar per day, and not more than two dollars per day'; to which charge the defendant excepted."

WOOD & WOOD, and H. B. FOSTER, for appellant.

T. N. McCLELLAN, Attorney-General, for the State.

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SOMERVILLE, J.—The defendant was convicted of failing to work the public roads, after being legally notified to do so. Acts 1876-77, p. 135.

The only question raised is, whether the defendant was not exempt from liability to road duty, under the agreed state of facts, as recited on the bill of exceptions.

It is first contended, that the defendant, being an employee of the Alabama Insane Hospital, was for this reason exempt, under the provisions of section 1500 of the Code of 1876. It is a sufficient answer to this suggestion, that the bill of exceptions fails to show that the defendant was occupied or engaged in the capacity of such employee, at the time he was notified to work the road. Construing the bill of exceptions most strongly against the exceptant, the inference of fact must be taken to be otherwise.

The second ground upon which such claim of exemption is based is, that the defendant was, at the time of being warned, an active member of the Tuskaloosa Fire Company, No. 1, having, for several years previous, regularly performed the duties of a fireman in such organization. It is provided by section 4 of the act incorporating this company, that its members shall be "exempt from military duty, *road-tax*, performance of jury duty as grand and petit jurors in the Circuit and Probate Courts of Tuskaloosa county, so long as they continue to perform the duties of firemen under this act."—Acts 1851-52, p. 279. Does "*road-tax*", in this section, mean road-duty? If not, can the word have any operation whatever? The obvious purpose of the exemption is to relieve members of this fire-company from certain public duties, which are so continuous in their nature as to interfere seriously with the prompt discharge of their duties as firemen. It has long been the policy of our legislation to encourage organizations of this kind, which usually have their origin in motives of an unselfish and public-spirited benevolence. While we recognize the rule, that the intention to exempt particular classes or individuals from public burdens should be expressed in clear and unambiguous terms, and that such exemptions should be generally construed with strictness; yet it is not to be contended that this rule of construction should be carried so far as to defeat entirely the legislative purpose. It is only one of many rules by which we are enabled to ascertain such intention. In our opinion, the word "*road-tax*" was intended here to mean road-duty. It is used in connection with the cognate subjects of military duty and jury duty. In its strict sense, there is no such assessment as a *road-tax* under our laws. The nearest approach to it is the additional poll-tax which is sometimes imposed in city charters as the price of exemption from liability to work on the streets of a city.—Acts

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1872-73, p. 385, § 39. We do not think it had reference to this poll-tax. It must be construed to mean an assessment upon the personal labor of the party liable to road duty, which, in a broad and comprehensive sense, is in the nature of a tax.—*Bank of Ithaca v. King*, 12 Wend. 390. If this construction is not given it, no field whatever is left for its operation. It would offend a fundamental rule of statutory construction, to say that the General Assembly meant nothing by the words which they have chosen to use, merely because of their ambiguity of meaning. It is only cases of this nature which require the aid of judicial construction. Those free from all ambiguity and doubt need none.

The charge of the Circuit Court was, in our opinion, erroneous; and the judgment is reversed, and the cause remanded.

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Indictment for Bigamy.

1. *Proof of former marriage.*—In a prosecution for bigamy (Code, § 4185), the fact of a former marriage, valid by the laws of the country in which it was contracted, must be proved by competent evidence, and beyond a reasonable doubt; but it may be proved by the admissions or confessions of the defendant, in the absence of any evidence of statutory regulations on the subject, without the production of a record, or the testimony of a person who was present, the sufficiency of such admissions or confessions being a question for the determination of the jury.

2. *Proof that former wife (or husband) was still living.*—The prosecution must prove, also, that the former wife (or husband) was living at the time the second marriage was contracted; but this may be proved by circumstantial evidence, and positive evidence is not indispensable.

3. *Same; presumption as to continuance of life, or of death from absence for five years.*—When the prosecution has proved that the former wife (or husband) was alive at a specified time before the second marriage, a presumption arises in favor of the continuance of life, and it is then incumbent on the defendant to prove death, or a continuous absence for the period prescribed by the statute (Code, § 4186); and if he left his wife in the State in which they were married, her continued residence there is not *absence* within the meaning of the statute.

4. *Sufficiency of indictment.*—An indictment for bigamy must aver that the second marriage was unlawful, and it is not sufficient to aver that the defendant, "having a former wife living, married A. B."

FROM the Circuit Court of Jefferson.

Tried before the Hon. S. H. SPROTT.

The indictment in this case contained but a single count, which charged that the defendant, Abner H. Parker, before

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the finding of the indictment, "having a former wife living, married one Maggie Earnest, against the peace," &c. There was no demurrer to the indictment, but, after conviction, the defendant moved in arrest of judgment, on account of the insufficiency of the indictment; which motion was overruled. On the trial, as the bill of exceptions shows, the State introduced Geo. S. Earnest as a witness, who was a brother of said Maggie Earnest, and who testified to the marriage of the defendant with the said Maggie Earnest on the 5th of November, 1884. This witness further testified that, in April, 1884, he received letters and telegrams from North Carolina, which led to the defendant's arrest on the charge of bigamy; and he repeated conversations between himself and the defendant, at the time of the arrest, and subsequently thereto, in which the latter admitted his former marriage in North Carolina, but protested that, at the time of his second marriage, he did not know whether his first wife was living or dead, and promised, on condition of his release, to go back to North Carolina and take care of her; and further admitted that, in October, 1884, he had written to her, telling her that he was going to Texas, or Louisiana, and that she must not write to him again at Oxmoor. One King, another witness for the State, testified, in substance, that he had known the defendant in Goldsboro, North Carolina, which place witness left in June, 1883; that there was a woman in that place, "who was known there as the defendant's wife, and who had a daughter, whom witness understood to be defendant's: that defendant had children in Goldsboro, and witness knew his son Stanley," and frequently saw defendant at the house where the woman and her daughter lived; and that when he met the defendant, more than a year afterwards, in Georgia, and later at Oxmoor, Alabama, and made inquiries after his family, defendant said that they were all well.

The court charged the jury, in writing, as follows: (1.) "On a trial for bigamy, proof of the first marriage and its validity may be proved by the defendant's confessions alone." (2.) "Confessions of guilt alone may not be sufficient to convict, but confessions alone are sufficient to prove the first marriage; and if there is other evidence to prove the second marriage, that is to be considered by the jury."

The defendant excepted to each of these charges, and requested the following charges in writing: (1.) "If the jury believe the evidence, they must find for the defendant." (3.) "To make out a case of bigamy, the proof must show that the defendant married Miss Earnest, having at the time another wife living, and confessions alone are not sufficient to show the former marriage; and if the jury do not find from the evidence other facts corroborating such confessions, they must find the

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defendant not guilty." (4.) "If the jury believe, from the evidence, that the defendant married Miss Earnest in November, 1884, and that at various times, before and since said marriage, he confessed to having a former wife living; they would not be authorized to find the defendant guilty, unless they further find that he actually cohabited with the woman alleged to be his former wife; and cohabitation means a living together by a man and woman as husband and wife." (5.) "Even if the jury believe, from the evidence, that the defendant had a wife living in June, 1883, that does not show that she was living in November, 1884, when the second marriage is alleged to have taken place. It is incumbent on the prosecution to prove that the defendant had another wife living at the very time of the second marriage; and if the State has failed to prove this fact, the jury must find the defendant not guilty." (6.) "If the jury believe, from the evidence, that the defendant had a wife living in October, 1884, that does not show that she was living on the first of November, 1884, when the second marriage is alleged to have taken place; and it is incumbent on the State to show that he had another wife living at the time of the second marriage." (7.) "Having a former wife living at the time of the second marriage, is a necessary ingredient of the offense of bigamy; and the second marriage being admitted, confessions alone of having a former wife living at the time will not authorize a conviction." (9.) "Marriage may be proved by cohabitation and reputation; but there must be sufficient proof to establish to the satisfaction of the jury, beyond a reasonable doubt, actual cohabitation—that is, living together as man and wife." (10.) "Evidence which might satisfy the jury that the defendant had a wife living in June, 1883, is not proof that he had a wife living when he married Miss Earnest in November, 1884, but is a circumstance to be considered by the jury; and the fact that she was shown to have been living in June, 1883, creates no presumption that she was living at the time of the marriage in November, 1884. On the contrary, the law presumes the innocence of the defendant until the contrary is shown; and as between the presumption of the continuation of life of the alleged first wife and the innocence of the defendant, the law would presume the death of the alleged first wife, in order to sustain the presumption of the defendant's innocence." The court refused each of these charges, and the defendant excepted to their refusal.

E. T. TALLAFERRO, for the appellant.—Proof of reputation alone, without cohabitation, is not sufficient.—Wharton's *Crim. Ev.* §§ 170-71; *Westfield v. Warren*, 3 Halst. 349; *Wood v. The State*, 62 Geo. 406; 58 Illinois, 58; *Langtry v. State*, 30

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Ala. 536; *Williams v. State*, 54 Ala. 136; *Brown v. The State*, 52 Ala. 338; 9 Paige, 614. Confessions, without proof *aliunde* of marriage, are not sufficient.—Wharton's Crim. Ev. § 172. When the presumption of life conflicts with that of innocence, the latter will prevail.—U. S. Digest, 1st series, vol. 5, 503; *Sharp v. Johnson*, 22 Ark. 79; *West v. State*, 1 Wisc. 209; *Cameron v. The State*, 14 Ala. 550; 1 Greenl. Ev. § 35; *Wilkie v. Collins*, 48 Miss. 511; 4 N. Y. 237; 3 Stark. Ev. 895.

T. N. McCLELLAN, Attorney-General, for the State.—(1.) The exception to the charges given was general, and can not prevail if any of them is correct.—*Chatteaux v. State*, 52 Ala. 388; *Oden v. State*, 52 Ala. 401; *Stovall v. Fowler*, 72 Ala. 77; *Farley v. State*, 72 Ala. 170. (2.) The charges asked, as to the sufficiency of confessions alone to prove the former marriage, were properly refused, because abstract, since there was other evidence in addition to the confessions. That confessions alone are sufficient, especially when the first marriage occurred in another State, see *Williams v. State*, 54 Ala. 131, and authorities there cited; 48 Amer. Dec. 115, NOTE. (3.) Proof of marriage alone, without cohabitation, was sufficient.—*Beggs v. State* 55 Ala. 108. (4.) A presumption is evidence only—nothing more nor less. In criminal cases, the presumption of innocence does not prevail against the presumption of malice arising from the use of a deadly weapon, nor against the presumption that a man intends the natural consequences of his acts.—*Dotson v. State*, 62 Ala. 141; *Jones v. State*, 68 Ala. 85. Nor can it overcome the presumption as to the continuance of life, especially on the facts proved in this case.—*Cameron v. State*, 14 Ala. 550; 2 Ad. & El. 540.

CLOPTON, J.—When marriage constitutes an essential ingredient of a criminal offense, a marriage in fact, valid according to the laws of the country where contracted, must be proved by competent evidence, beyond reasonable doubt. In respect to the competency of the confessions of the defendant, as evidence of the first marriage, in a prosecution for bigamy, the authorities both in England and this country have differed. The weight of authority is in support of the proposition, that, in the absence of local laws prescribing formalities and ceremonies to validate a marriage, the first marriage may be proved by the admissions of the accused.—*Miles v. U. States*, 103 U. S. 304. A review of the authorities will not serve any useful purpose, as the rule that such confessions, when voluntary and properly identified, are admissible in evidence, on the same principle, and in like manner as other confessions, may be regarded as settled in this State. In *Langtrety v. State*, 30 Ala. 536, it was held,

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that in prosecutions for bigamy, marriage may be proved by cohabitation and the confessions of the party; and if the proof be full and satisfactory, it is not necessary to produce either the record of the marriage, or the testimony of a person who was present. And in *Williams v. State*, 54 Ala. 131, it was held, that as, by the common law, consent, followed by cohabitation, constitutes a valid marriage, the admission of a marriage in a State where the common law is presumed to exist, is the admission of a fact which may rest in parol only—of which there is not necessarily higher evidence; that such admissions are competent evidence of a marriage, and that the jury were to determine whether they involved an admission of its validity. Cohabitation and reputation alone may not be sufficient, as cohabitation frequently occurs without marriage, and the relation of husband and wife is sometimes assumed to avoid scandal and social ostracism. The presumption of marriage from cohabitation and reputation is more or less strong according to the accompanying circumstances; but confessions of marriage may be supplemented and strengthened by proof of cohabitation and reputation. The admissions of the defendant, of a first marriage in North Carolina, were admissible in evidence, there being no proof of any statutory regulations. No question is raised as to the voluntary character of the confessions; and the sufficiency of the confessions, and former admissions, to establish the fact and validity of the first marriage, was for the determination of the jury. If sufficient to satisfy them beyond a reasonable doubt, no other evidence is necessary.—*Williams v. State, supra*.

2. Proof that the first wife was living at the time of the second marriage is essential to conviction. Direct and positive evidence is not indispensable. The fact may be shown by circumstantial evidence. By the common law, the continuation of life, ordinarily, is presumed until death be shown. An exception, borrowed originally from the statutes in relation to bigamy, is the presumption of death after an absence of seven years, without having been heard from. By our statute, any person who did not know, at the time of the second marriage, that his or her former wife or husband was living, and whose former wife or husband had remained absent from him or her for the last five years preceding such second marriage, may lawfully marry a second time.—Code, § 4186. To constitute the statutory exception an available defense, continuous absence for the last preceding five years, and ignorance of the life or death of the former husband or wife, must concur. When the prosecution proves that the former husband or wife was alive at a specified period before the second marriage, it is incumbent on the defendant to show either death, or a continuous absence for

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the period prescribed by the statute. Says Mr. Wharton : " A party who marries within the time limited by the statute does so, so far as this exception is concerned, at his own risk. . . . Hence, on an indictment for bigamy, the death of the husband, if claimed to have occurred within seven years from his absence, must be proved as any other fact, aside from the legal presumption created by the exception to the statute."—2 Whar. Crim. Law, §§ 1704, 1705. And in *Jones v. State*, 67 Ala. 84, BRICKELL, C. J., construing our own statute, says : " Whoever marries a second time, having a former husband or wife living, absent for a less period than five years, violates the statute, and is subject to punishment."

It is not meant there are no cases, in which death will be presumed from unexplained absence for a less period than five years. Questions of conflicting presumptions may arise ; and the accompanying circumstances as to age, or health, or condition may be such, that the presumption of innocence will overcome the presumption of the continuance of life. A consideration of the circumstances, under which the one presumption will countervail, or overcome the other, is unnecessary, as no question of conflicting presumptions arises on the record. Absence, from which death is presumed, is absence abroad ; absence from the former place of abode, where nothing has been heard of the absent person by those who would naturally have heard of him, if alive. If the defendant left his wife in North Carolina, where they formerly resided, and absented himself from that State, the presumption of her death can not arise by reason of his absence, or of his having heard nothing from her. To create such presumption, it is necessary to prove *her* absence abroad, without being heard from, during the statutory period, or under such circumstances as will authorize the presumption of death within a shorter period. There was no evidence that the wife had been absent abroad for any length of time ; and the confessions of defendant tended to show he had corresponded with her, to a short time before the second marriage—not exceeding a month. In such case, the wife being shown to be alive at a specified period before the second marriage, life is presumed to continue, and death, if claimed, must be proved as any other fact. A husband can not create absence by abandoning his family, and then invoke the presumption of innocence to destroy the presumptive proof of continuing life. On such facts, there can be no inference of death, available as a defense ; and the presumption of innocence only avails as in other criminal cases—that each essential ingredient of the offense must be proved beyond a reasonable doubt.

The charges numbered five, six and ten, requested by the defendant, were properly refused. They were tantamount to

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instructions, that positive evidence that the former wife was living at the time of the second marriage is necessary, and that the jury could not find such fact from proof that she was alive a short time prior thereto. The other charges requested assert propositions in conflict with the principles of this opinion. There is no error in the charges given at the request of the prosecution.

4. We are compelled, however, to reverse the judgment, because of a defect in the indictment. Both at common law, and under the Code, it is necessary to aver that the second marriage was unlawful. A person may lawfully marry a second time, having a former husband or wife living, if within the exceptions provided by section 4186. While it is not required of the prosecution to prove that the defendant is not included within either of the exceptions, it is necessary to negative the fact by an averment that he unlawfully married the second time. Otherwise an offense is not necessarily charged.

Reversed and remanded.

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Indictment for Assault with Intent to Murder.

1. *Election.*—In a prosecution for an assault with intent to murder, if the testimony of the prosecutor shows two distinct assaults upon him by the defendant, each being an attempt to shoot him with a gun within shooting distance, and the interval between the two being too great to constitute them parts of one and the same transaction, the prosecution should be required to elect between the two offenses.

2. *Assault with intent to murder ; constituents of offense ; presumption of malice, from use of deadly weapon.*—Every assault with intent to kill is not necessarily an assault with intent to murder : there must be malice in the attempt. But, when the assault is made with a deadly weapon, in sufficient proximity to inflict a deadly wound, the law implies malice from the use of such weapon, and casts on the defendant the *onus* of proving that the assault was in self-defense, or that the killing, if consummated, would not have been murder ; unless these defensive facts are shown by the testimony which proves the assault.

FROM the City Court of Mobile.

Tried before the Hon. O. J. SEMMES.

The indictment in this case charged that the defendant, Frank Williams, "unlawfully and with malice aforethought assaulted Irvin Johnson with a gun, with the intent to murder him." On the trial, as the bill of exceptions states, the said Irvin Johnson, being introduced as a witness for the prosecu-

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tion, "testified in substance as follows: That the defendant shot him last year, in Mobile county; that he did not recollect the exact time, but it was since last summer (the summer of 1884), and before the finding of the indictment; and that the shooting took place under the following circumstances: Witness was walking along close to his house, when he saw the defendant lying in the bushes asleep, and called to his wife, who was the defendant's mother, and told her to look at her boy lying there asleep. Defendant then jumped up, with a gun in his hands, and snapped one barrel of his gun at him, being about twelve feet from him at the time. Witness then turned away, and walked to the house of one Juzan, about three hundred yards distant, where there were several persons, and told them that his boy down there had tried to kill him; and, after staying there a very little while, he walked off down a lane, on the way to town, and got on a bridge which crossed the creek. By this time, the defendant had cut across the field from where he first assaulted witness, and came up behind witness, while he was walking across on said bridge, and shot him, striking him in the back with one shot. Witness was walking away from him at the time, and did not see defendant at the time of the shooting. When defendant shot witness, they were about thirty-nine steps apart. The shot was never taken out, and is now in witness' back. A doctor probed for it, but could not get it. Witness never saw the shot, but he thought it was a buck-shot, from the fact that he saw where six buck-shot struck a post near where he was standing at the time, and there were no shot in said post up to that time." Leon Nicholas, another witness for the State, "testified, that he saw the defendant shoot at said Johnson on the 22d July, 1884; that said Johnson, just before the shooting, came up to the house of one Juzan, where witness and several other persons were, and told them that the defendant had tried to kill him; that Johnson then started off towards town, and, as he was on a bridge which crossed the creek, the defendant in the meantime had crossed through the field, and came up to the fence behind Johnson, and fired, Johnson walking away from him at the time, and being about fifty yards off. The defendant asked the court to strike out this evidence, as it tended to prove a different assault from the one proved by said Johnson. The court overruled the objection, and the defendant excepted. The defendant then asked the court to require the prosecution to elect upon which assault it would proceed; but the court refused to require an election, because both assaults constituted but one and the same transaction; to which ruling and refusal the defendant excepted."

The defendant requested the following charges to the jury: (1.) "A probability of the defendant's innocence is a just

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foundation for a reasonable doubt of his guilt, and therefore for his acquittal; and if there is a probability that the defendant, at the time he assaulted said Johnson, intended merely to kill him, it is the duty of the jury to find him not guilty of an assault with intent to murder." (2.) "Proof of an intent to kill merely is not sufficient proof of an intent to murder; and it is the duty of the jury, on such proof, to find the defendant not guilty of an assault with intent to murder." The court refused each of these charges, and the defendant duly excepted to their refusal.

The name of the appellant's counsel, if any appeared in this court, is nowhere shown; and there is no brief on file.

T. N. McCLELLAN, Attorney-General, for the State.

STONE, C. J. —If Johnson's account of the altercation be the true one, defendant committed an assault on him, when he first attempted to shoot him near Johnson's residence. This attempt, the testimony of this witness tends to show, was made with a gun, and within shooting distance. In the absence of proof that this was done in self-defense, or under such provocation as to reduce the offense to man-slaughter, if death had ensued, this was an assault with intent to commit murder.—*Allen v. The State*, 52 Ala. 391; *Meredith v. The State*, 60 Ala. 441; *DeArman v. The State*, 71 Ala. 351.

The testimony does not inform us what time elapsed between the first alleged assault, referred to above, and the actual shooting. It was long enough for Johnson to walk three hundred yards, hold a conversation, the duration of which is not given, and then walk some distance in a different direction. It is probable the interval was not less than fifteen minutes—possibly, much more. The second assault did not succeed the first so nearly in point of time, "as to constitute in fact but one transaction."—*Johnson v. The State*, 35 Ala. 363.

As there is testimony tending to show that the second assault, like the first, was made with intent to take life, they must, in the state of the proof before us, be treated as two distinct, substantive offenses, and the prosecution should have been put to its election.—*Elam v. The State*, 26 Ala. 48; *Mayo v. The State*, 30 Ala. 32; *Cochran v. The State*, *Ib.* 542; *Hughes v. The State*, 35 Ala. 351; *Wooster v. The State*, 55 Ala. 217; *Bass v. The State*, 63 Ala. 108; *Jackson v. The State*, 74 Ala. 26. Some rulings may be found scarcely reconcilable with these, but our rule has prevailed too long to be disturbed.—1 Bish. Cr. Proc., 3d Ed., § 449, and notes; Whar. Cr. Pl. & Prac., 8th Ed., § 293, and notes. See, also, Clark's Man. § 2218;

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People v. Rynders, 12 Wend. 425; *Dowdy v. Com.*, 9 Grat. 727.

It is not every assault with intent to kill that is an assault with intent to commit murder. There must be malice in the attempt to take human life, to constitute this statutory felony. But, when the assault is made with a deadly weapon, in sufficient proximity to inflict a deadly wound, the law implies malice from the use of such instrument, and casts on the defendant the burden of proving that the killing, or attempt to kill, was in self-defense, or, if successful, would only be manslaughter; unless such defensive facts and circumstances are shown in the testimony which proves the killing, or attempt to kill.—*Hadley v. The State*, 55 Ala. 31.

Charges asked or given must be interpreted in the light of the testimony; and so interpreted, neither of the charges asked by defendant should have been given. They ignored all inquiry of justification, or extenuation, and asserted, in effect, that the prosecution must make independent proof of malice, beyond that which is implied from the unexplained use of a deadly weapon. This is not the rule. There is nothing in the other questions raised.

The judgment of the City Court is reversed, and the cause remanded. Let the defendant remain in custody, until discharged by due course of law.

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Indictment for Murder.

1. *Former difficulty, as part of res gestæ.*—When it appears that the deceased was killed in a rencounter with the defendant, caused by the latter's interference in another difficulty, immediately preceding it, between the deceased and a third person, whose quarrel the defendant espoused, the two difficulties constituting but one continuous transaction, it is competent for the prosecution to prove the former difficulty, as explanatory of the homicide.

2. *Self-defense; charges asked, ignoring inquiry as to who brought on the difficulty.*—On a trial for murder, charges asked as to the doctrine of self-defense, ignoring all inquiry as to who was at fault in bringing on the difficulty, are properly refused.

3. *Same; charge asked, ignoring apprehension of imminent danger.*—Charges asked, asserting the defendant's right to kill, "if the deceased attacked him with a knife, and was cutting at him;" or, "if the deceased had him down, and had his knife in his hand," but ignoring the question of a reasonable apprehension of real or apparent danger to life or limb, are properly refused.

4. *Abusive language at time of difficulty.*—As to abusive language used

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by a person assaulted or beaten, at or near the time of the difficulty, which may be good "in extenuation or justification as the jury may determine" (Code, § 4900), the statute applies only to prosecutions for assault, assault and battery, and affray.

5. *Polling jury.*—When, in polling the jury, a juror answers that he agrees to the verdict, without other remark or explanation, this court will not presume, for the purpose of imputing error, that he wished to make explanation, merely because the defendant's counsel asked that he be allowed to explain, and the court refused it, the juror himself saying nothing.

6. *Murder and manslaughter.*—To reduce a homicide from murder to manslaughter, the killing must not only have been perpetrated without malice, express or implied, but must also have been done in a sudden heat of passion, upon reasonable provocation, or in mutual combat.

FROM the Circuit Court of Pike.

Tried before the Hon. JOHN P. HUBBARD.

The defendant in this case, Nathan Prior, was indicted and tried, jointly with Daniel Lawrence, for the murder of Man Copeland, by shooting him with a pistol; was convicted of manslaughter in the first degree, and sentenced to the penitentiary for the term of two years, Lawrence being acquitted. On the trial, as the bill of exceptions shows, the State having introduced one Mobley as a witness, who testified that he was present at the time of the difficulty between the deceased and the defendant, which occurred at the house of one Dinkins, where they were attending a "party"; the solicitor "asked the witness to state how the difficulty began; to which the witness answered, that the deceased had a difficulty with John Warren, and Warren was cutting at him with a knife. The defendant's counsel objected to this, and moved the court to exclude what witness said about Warren cutting at the deceased, as witness could not go into particulars of the difficulty with a third party. The court overruled the objection, but said that it would be no evidence against the defendant, and instructed the jury, at the time, that they should not consider it as evidence against the defendant; and the defendant excepted." The witness, continuing, said: "Copeland kicked and pushed Warren out of the house. Nathan Prior took it up. Copeland asked, if he took it up; and Prior said, he did. Copeland shoved and kicked him out of the house. Prior stayed out about fifteen minutes, and came back with a pistol in his hand, pointing at the deceased, and said, '*Man Copeland, I will not be run over in any such way*'; and he had the pistol drawn on the deceased, who looked surprised. Rena Pearson caught hold of Prior, and said, '*Don't shoot in here among my children*', and turned him around. Copeland caught hold of Prior, and was crowding or shoving him backwards, when Prior fell over a chair, and, as he fell, he shot." Other witnesses testified, in substance, to the

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same facts, and there were no material discrepancies in the testimony.

The defendant asked the following charges, which were in writing, and each of which was refused by the court, exceptions being duly reserved to their refusal:

"2. If the jury believe, from the evidence, that the defendant was in imminent danger of life, or of great bodily harm being caused or done by the acts of the deceased at the time the shooting occurred, they must find the defendant not guilty:

"3. If the facts and circumstances attending the homicide were of such nature as to reasonably impress the mind of the defendant that he was in great danger of peril to life, or of great bodily harm, they must find him not guilty.

"4. To constitute murder aforethought, the defendants must have killed the deceased, knowing at the time what they were doing. If it was done in the heat of passion, it would not be murder; there can be no murder, where the killing is done in the heat of passion.

"5. If the jury believe, from the evidence, that the deceased brought on the difficulty, and put Prior out of the house; and that Prior went back into the house, with a pistol in his hand, and told the deceased that he would not be run over; and the deceased attacked him again, with a knife in his hand, and was cutting at him, then the defendant had a right to shoot.

"6. If the jury believe, from the evidence, that the difficulty was brought on by the deceased, and that he kicked or pushed the defendant Prior out of the door; and that the defendant came back, with a pistol in his hand, but did not attack the deceased; and that the deceased renewed the attack on the defendant, and had the defendant down, and had his knife in his hand; then the defendant would be justified in shooting the deceased.

"9. If the jury have a reasonable doubt as to whether, at the time of the shooting, the deceased was assailing the defendant with a knife, in such a manner as to reasonably impress the defendant with the necessity of killing the deceased in order to save his own life, or to save himself from great bodily harm, they must acquit the defendant.

"14. If the jury believe, from the evidence, that the defendant, after returning into the house where the deceased was, and in the presence of the deceased, with a pistol in his hand, remarked, '*I do not like the way I have been treated; now, God damn you, help yourself;*' such words do not, of themselves, justify an assault on the party using them, by the party to whom they were addressed."

When the jury returned with their verdict, the defendant asked that they might be polled; "whereupon, the court asked

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the first juror, B. J. Cotten, *'Is that your verdict?'* He answered, *'Yes, I agree to it.'* The court asked the next juror, if that was his verdict. The defendant's counsel stated to the court, that the juror Cotten wanted to explain, and asked that he be allowed to do so; but said juror did not ask the court to allow him to explain, nor did he say anything about wanting to explain, nor anything at all. The court kept on polling the jury, and, in this way, refused the request of said counsel; and the defendant excepted."

The name of the appellant's counsel, if any appeared in this court, is not shown by either the record or the dockets.

T. N. McCLELLAN, Attorney-General, for the State.

SOMERVILLE, J.—1. The defendant was indicted for the murder of one Copeland, and was convicted of manslaughter in the first degree.

The Circuit Court, upon the trial, allowed a witness, by way of introduction to the facts attending the killing of deceased, to advert in general terms to a difficulty between the deceased and one Warren, immediately preceding the one with the defendant, the former of which is shown to have led to the latter. In this we think there was no error, the two affrays being so closely connected as to obviously constitute but one and the same transaction. The interference of the deceased in the first seems to have led to the second, and a proper understanding of the one is necessary in order to comprehend the other. The two embrace but one continuing transaction, and, occurring at the same time and place, together constitute but the *res gestæ* of a single principal fact.

2. We discover no error in the refusal of the court to give the various charges requested by the defendant. Many of these charges entirely ignored all inquiry as to who was at fault in bringing on the difficulty—a fact which should have been submitted to the determination of the jury. This objection applies to charges numbered two, three, and nine respectively.

3. Charges numbered five and six are defective, in failing to predicate the defendant's right to kill in self-defense, among other things, upon the condition of his reasonably apprehending a real or apparent danger of life or limb. The mere fact of his being attacked by deceased, and his being cut with a knife in his hands, obviously would not, without more, make the homicide excusable.

4. The state of facts under which opprobrious words, or abusive language, used by a person who is assaulted or beaten, at or near the time of the assault or affray, may be good in extenua-

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tion or justification, is a matter left by the statute expressly for the determination of the jury; and the statute, moreover, is confined to trials where the indictment is for assault, assault and battery, or affray.—*Taylor v. The State*, 48 Ala. 180; Code, 1876, § 4900; *Brown v. The State*, 74 Ala. 42. The fourteenth charge was, for this reason, properly refused.

5. When the juror, Cotten, was polled, in connection with the other jurors, his reply to the court unquestionably showed his assent to the verdict. If he desired to explain the matter further, he should have made known his wishes to the court before the jury was discharged. We can not assume, for the purpose of putting the court in error, that the counsel for the defendant had any authority to make a request, in behalf of this juror, to be allowed such opportunity for explanation. *Non constat*, but that the juror may have entertained no such desire.

6. To reduce a homicide from murder to manslaughter, the killing must not only have been perpetrated without malice, express or implied, but it must also have been done in a sudden heat of passion, upon reasonable provocation, or in mutual combat. There must be a concurrence of adequate provocation, and of ungovernable passion.—Clark's Man. Cr. Law, §§ 419, 421. The fourth charge was not in harmony with this principle, and was properly refused.

We discover no error in the record, and the judgment is affirmed.

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Indictment for Obtaining Money by False Pretenses.

1. *Former acquittal, or conviction; certainty requisite in plea.*—A plea of former acquittal, or former conviction, which are among favored pleas, requires only certainty to a common intent in its averments; but it must show the essential identities of person and offense, if not by averment in express terms, at least by the averment of facts which show such identity with reasonable certainty.

2. *Same; forgery of order for money, or uttering forged order as true, and obtaining money by false pretenses on such order.*—An indictment for the forgery of a written order for money, and for uttering such order as true knowing it to be forged, and an indictment for obtaining money on such order by falsely pretending that it was written by the person whose signature to it was forged, on their face charge separate and distinct offenses; and a plea of former conviction under the first, setting out the indictment and the verdict of the jury, and averring that the offense charged in the second "is based upon, and is of the same transaction as

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alleged in the first indictment," without more, does not show the identity of the two charges as one offense.

3. *Same; must be specially pleaded.*—A former conviction must be specially pleaded, and can not be given in evidence under the plea of not guilty.

FROM the Circuit Court of Shelby.

Tried before the Hon. LEROY F. BOX.

The indictment in this case charged, in the first count, that the defendant, Thomas Baysinger, "with intent to defraud, did falsely pretend to *M. F. Pope* that *G. W. McGowen* had signed an order, which the said defendant presented to said Pope, and by means of such false pretense obtained from said Pope four and 50 100 dollars;" and in the second count, in the same words, that the pretense was made to *J. F. Pope*, and the money obtained from him. The defendant filed a special plea of former conviction, at the same term of the court, under an indictment which charged the defendant with the forgery of an order on said McGowen for \$4.50, and with uttering said order as true knowing it to be forged. The plea was in these words: "Defendant says, that the State of Alabama ought not further to prosecute said indictment against him, because he says that, heretofore, to-wit, at the Circuit Court of said county, Spring term, 1885, the grand jurors, upon their oaths, in an indictment found by them, presented that Thomas Baysinger *falsely, and with the intent to defraud or injure, did forge an order purporting to be the act of one G. W. McGowen,*" &c., thus setting out the former indictment in full, including the signature of the solicitor; "and that heretofore, to-wit, at the Circuit Court of said county, Spring term, 1885, present the Hon. *L. F. Box*, judge, said defendant was arraigned, and tried before a jury of twelve men, who, after hearing the evidence and the charge of the court, returned their verdict in these words: 'We, the jury, find the defendant guilty as charged in the second count.' And the defendant saith, *that he is now charged in this present indictment with the intent to defraud, did falsely pretend to M. F. Pope,*" &c., thus setting out the indictment in full; "which offense, defendant alleges, is based upon, and is of the same transaction as alleged in the first indictment aforesaid; all of which defendant is ready to verify." The court sustained a demurrer to this plea, and the trial was had on issue joined on the plea of not guilty.

On the trial, as appears from the bill of exceptions, the State introduced one Pope as a witness, who was a clerk in the store of McGowen & Pope, and who testified that the defendant, in May, 1885, presented to him an order for "\$450 cents," which purported to be signed by *G. W. McGowen*, and which was produced (see a copy, *infra*, p. 63); that defendant said the order

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was written by G. W. McGowen, and that said McGowen owed him that sum; and that he gave the defendant the money on the order. The defendant objected to the testimony of this witness, and also to the admission of the order as evidence, on account of a variance in the name signed to it; and he reserved exceptions to the overruling of his objections. The State introduced evidence, also, tending to show that said McGowen did not write or sign said order, and did not owe the defendant anything. "The defendant asked permission of the court to offer evidence going to show that, upon the same evidence offered in this case, he had been convicted of forgery in the first degree;" and he duly excepted to the refusal of the court to admit this evidence. The defendant asked the court to instruct the jury, that they must acquit him, if they believed the evidence; and he excepted to the refusal of this charge.

W. S. CARY, for the appellant.

T. N. McCLELLAN, Attorney-General, for the State.

CLOPTON, J.—The pleas of *autrefois acquit* and *autrefois convict*, being founded on the common-law maxim, that no man shall twice be put in jeopardy for the same offense—a principle enlarged and enforced in the Federal and State constitutions—are classed among favored pleas. It has been said, the lowest degree of certainty will suffice—certainty to a common intent. The averments of the plea must be such as show that the defendant is entitled to the protection invoked. The plea must aver identity of persons, and identity of offenses; not necessarily in express terms, but at least facts showing with sufficient certainty the essential identities. The identity of the defendant with the person who was formerly acquitted, or convicted, cannot be a matter of inference.—*Henry v. State*, 33 Ala. 389.

The record of the former conviction set forth in the plea shows, that the first and second indictments charge apparently separate and distinct offenses. In such case, an averment in terms of the identity of the offenses may be sufficient; but, if the defendant, in the absence of such averment, would avail himself of the defense of former conviction, the plea must contain allegations showing that the act charged in each indictment constitutes an integral offense, and is the same act. Setting forth the record of the former conviction is not itself sufficient. A general averment, that the offenses are based on, and are of the same transaction, is not tantamount to an allegation of their identity in fact and in law.

Evidence of a former conviction is not admissible under the
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plea of not guilty. There is no error in the rulings of the court on the exclusion of evidence, or in the refusals to charge as requested by the defendant.

Affirmed.

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Indictment for Forgery.

1. *Forged instrument; sufficiency to support indictment, with averment of extrinsic facts.*—An order written dimly in pencil, asking the person to whom it was addressed to send by the bearer, who was the defendant, “\$450 cents,” and signed by a name which appears to be *G. W. McGowen*, has the capacity to deceive, and is sufficient to support an indictment for forgery, with the additional averments that the amount called for was intended for four dollars and fifty cents, and that the name signed to it meant *G. W. McGowen*.

2. *Declarations of defendant, when delivering forged instrument.*—The declarations of the defendant on delivering the order to the person to whom it was addressed, that it was written by *McGowen*, are admissible as evidence against him, as a part of the *res gesta* connected with the act of utterance, and as supporting the averment of the indictment that the name signed to the order meant *McGowen*.

3. *Province of court and jury, as to meaning of forged instrument.*—While it is the province and duty of the court to interpret and construe writings, and to instruct the jury as to their legal meaning and effect; yet, the writing alleged to have been forged being apparently signed *G. W. McGowen*, which the indictment alleged meant and was intended for *G. W. McGowen*, a charge instructing the jury that the order “purports to be signed by *G. W. McGowen*” is an invasion of their province.

FROM the Circuit Court of Shelby.

Tried before the Hon. LEROY F. BOX.

The defendant in this case, Thomas Baysinger, was indicted for the forging of a written instrument, which was in these words: “*Mr. Pope, please send me \$450 cents By the Bearer, Thome Baysinger, and oblige G. W. McGowen*”; which was written dimly in pencil, on a small scrap of paper, and the original of which was, by an order of the court below, sent to this court for its inspection. The indictment contained two counts, the first charging that the defendant forged the writing, and the second that he uttered and published it as true, knowing it to be forged; and each count averred, in addition, that “\$450 cents,” as used in the writing, was meant and intended for “\$4.50,” and that “*G. W. McGowen*” was meant and intended for *G. W. McGowen*. There was a demurrer to the indictment, which was overruled; and the trial was had on issue

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joined on the plea of not guilty. On the trial, as the bill of exceptions shows, "the State introduced one Pope as a witness, who testified, that he was a clerk in the store of McGowen & Pope, of which firm G. W. McGowen was a member; that one Wednesday in May, 1885, the defendant called at said store, and told witness he wanted to get some money; that he (witness) replied, that it would take good paper to get it; that defendant said he had the paper that would get it, and thereupon produced and presented the writing" above set out, "which he said was written by said G. W. McGowen," and that he gave the defendant \$4.50 on said order. The defendant objected to the testimony of this witness, and also to the admission of said order as evidence, on the ground of a variance between it and the writing described in the indictment. "The court then inspected the order and the indictment, and stated, in the presence of the jury, that the order was addressed to Pope, and purported on its face to have been signed by G. W. McGowen; and thereupon overruled the defendant's said objections, and admitted said order in evidence; to which ruling, and also to said remark of the court, the defendant excepted."

W. S. CARY, and W. T. JOHNSON, for the defendant, cited Bouv. Law Dic., vol. 1, p. 700; 2 *Ib.* 185; 17 Amer. Dec. 449; 1 *Ib.* 589; 22 *Ib.* 767; 39 *Ib.* 457; *Sayers v. The State*, 30 Ala. 15.

T. N. McCLELLAN, Attorney-General, for the State, cited *Gooden v. The State*, 55 Ala. 178; *Rembert v. The State*, 53 Ala. 467; *Butler v. The State*, 22 Ala. 43.

STONE, C. J.—The defendant was indicted for the forgery and uttering of an order purporting to be made by one G. W. McGowen, with intent to defraud. The order has been sent up for our inspection, by order of the trial court. It is in pencil, and very dim. A substantially correct copy is set out in each count of the indictment. The questions raised, and urged here for a reversal, relate to the sufficiency of the paper to deceive and defraud. It is contended that the alleged order is ambiguous and incomplete in two respects: First, in the sum of money it calls for; and, second, in the name of McGowen, which the indictment charges was forged.

In Clark's Manual, § 1148, it is said: "An appearance of validity on its face is enough to make the instrument a subject of forgery." In the same section it is said: "The law looks only to the falsity of the instrument, and the fraudulent use of it as genuine." In *Com. v. Stephenson*, 11 Cush. 481, it was decided, that "a person may be convicted of forging a check

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on a bank, although the counterfeit does not so much resemble the genuine check of the drawer, as to be likely to deceive the officers of the bank on which it is drawn." So, in *Clark's Manual*, § 1157, quoting from *Hawkins' Pleas of the Crown*, is this language: "The notion of forgery does not seem to consist so much in the counterfeiting of a man's hand and seal, which may be often done innocently; but in endeavoring to give an appearance of truth to a mere deceit and fraud, and either to impose something false upon the world as the solemn act of another," &c. In *Rembert v. The State*, 53 Ala. 467, the entire instrument charged to have been forged was in the following language: *Due \$25 Askeew Brothers*." There was a conviction, and after an elaborate consideration of authorities by BRICKELL, C. J., the judgment of conviction was affirmed. Speaking of the general rule, that if the instrument is void on its face, it can not be the subject of a forgery, this court said it must be taken with this limitation: "When the instrument does not appear to have any legal validity, nor show that another might be injured by it, but extrinsic facts exist by which the holder of the paper might be enabled to defraud another, then the offense is complete; and an indictment averring the extrinsic facts, disclosing its capacity to deceive and defraud, will be supported. The fact that the paper is incomplete or imperfect in itself, and that without the knowledge of extrinsic facts it does not appear that it has the vicious capacity, only renders it necessary that the indictment should aver the extrinsic facts." So, in *Gooden v. The State*, 55 Ala. 178, the name attempted to be forged was *Thureatt*, but the forged instrument had it *Threet*. There was a conviction, and this court approved the ruling of the court on that question. See, also, 3 Greenl. Ev. § 103.

The sum of money called for by the order was thus expressed—" \$450 cents." We think the most natural import of the writing—that which would ordinarily be put upon it—is, that it was an order for four dollars and fifty cents. The name *McGowen* is imperfectly spelled. The last letter—possibly the last two—are omitted. The indictment charges that the writer intended, in the words or marks he employed, to express the name *McGowen*. "*Meaning thereby McGowen*," is the language of the indictment. The meaning of the writer was thus made a question for the jury. When the order was presented by defendant, the testimony of the witness Pope was, that defendant said it was written by McGowen. This testimony was clearly admissible, for more reasons than one. It was part of the *res geste* of the act of utterance charged in the second count, and was admissible as such. It was also admissible as tending to show that the name attached to the order,

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obscurely written as it was, meant, in the mind of the defendant, if he wrote it or procured it to be written, what the indictment charged was its meaning. The verdict of the jury proves their finding to have been that such was the meaning of the writer, and that it was uttered with intent to defraud. It did deceive Pope, if his testimony be true.

In the bill of exceptions is the following language: "The court further stated, in the presence of the jury, that the order purported to be signed by G. W. McGowen; to which the defendant excepted." It is, as a rule, the duty of the court to interpret writings, and such interpretation is a law to the jury. The order on its face, unaided by extrinsic facts, does not purport to be signed by G. W. McGowen. There is something wanting to complete the third syllable. In the instruction (for so we must treat it) copied above, the Circuit Court erred; and for this single error, its judgment must be reversed.

Reversed and remanded. Let the defendant remain in custody, until discharged by due course of law.

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Prosecution for Malicious Injury to Animals.

1. *Election; whether acts are distinct offenses, or merely continuous offense.*—Under a prosecution for maliciously disabling or injuring two mules, the property of the prosecutor (Code, § 4408), which were shot by the defendant while trespassing in his corn-field, the interval between the two shots being such a space of time as permitted a person, walking rapidly, to go about a quarter of a mile, the two acts are properly charged as one continuous offense, and there is no ground for compelling an election.

2. *Proof of foot-prints.*—A witness who measured tracks found at the place where the offense was committed, and compared them with tracks made by the defendant on the next day, may state that they "corresponded;" but he can not be asked whether a particular shoe, which he had seen on defendant's foot, "would have made" such a track as that found at the place.

APPEAL from the County Court of Jackson.
Tried before the Hon. JOHN B. TALLY.

The name of the appellant's counsel, if any appeared in this court, is nowhere shown by the record or docket.

T. N. McCLELLAN, Attorney-General, for the State, cited
Campbell v. The State, 23 Ala. 44; Barr. Cir. Ev. 264; *Hin-*
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kle v. Commonwealth, 4 Dana, 518; Bish. Stat. Crimes, 1115-17.

SOMERVILLE, J.—The defendant was tried and convicted, in the County Court of Jackson county, of the offense of unlawfully and maliciously disabling or injuring “two mules,” the property of the prosecutor, in violation of section 4408 of the present Code. An appeal is taken from the judgment to this court, under the provisions of an act approved February 9th, 1881, specially authorizing it.—Acts 1880-81, pp. 233-234, § 7.

The evidence shows that there was a brief interval of time between the shooting of the two mules, which were at the time trespassing in the corn-field of the defendant; and the question raised by the rulings of the court involves the inquiry as to whether or not the transaction constitutes two distinct offenses, or only one. If the former, the two offenses should have been charged in different counts, and the only right of the accused would have been to compel an election by the State of the count on which a conviction would be sought.—*Bass v. The State*, 63 Ala. 108; *Wooster v. The State*, 55 Ala. 217; *Burgess v. The State*, 44 Ala. 190.

We do not doubt that, under the charge in its present form, averring an injury to two mules, a conviction could be had for an injury to one only; the rule being, that allegations as to the extent of the property, which is the subject of the offense, are divisible, and that a variance as to the number is immaterial, unless the number stated constitutes the essence of the offense. Whar. Cr. Ev. (8th Ed.) §§ 125, 132. But this we need not decide, as it is our opinion that the two acts of shooting were perpetrated so nearly at the same time, as to constitute essentially but one cumulative offense. It is not shown precisely what was the interval of time between them; but it is asserted to have been such a space as permitted one, walking rapidly, to go about a quarter of a mile. This would probably occupy about three minutes. The two animals, as we have said, were trespassing upon defendant's crops when they were shot. They belonged to the same owner, and the *animus* of the one act of injury was, no doubt, identical with that of the other—the two being so closely connected in point of motive, time, locality and nature, as that the last may be justly regarded as but a continuation of the first, and done under the impulse of the same controlling design.—*Owens v. The State*, 74 Ala. 401; Whar. Cr. Pl. & Pr. (8th Ed.) § 474.

The rulings of the court, on this particular branch of the case, are free from error.

It was competent for the witness, Busby, who had examined the supposed track of the defendant's shoe made upon the

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ground in the field where the animals were shot, to say that it "corresponded" with a track made by defendant the day following, with which the witness seems to have compared it, by measurement and certain marked peculiarities. But the question propounded to the witness Lewis, in our judgment, was objectionable, as seeking to elicit a mere opinion, and not the statement of a fact from him. It was not competent for him to be asked, or, being asked, to state whether the shoe which he had seen on defendant's foot, run down as it was, "*would have made*" a track such as he had seen in the field. This was an issue materially affecting the guilt or innocence of the defendant, which should have been determined by the jury, on the facts deposed to by the witnesses, and not on their statements of mere conclusions, opinions, or inferences.

For this error, in admitting the witness Lewis to answer the question under consideration, the judgment of the court below must be reversed, and the cause remanded.

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Indictment for Petit Larceny.

1. *Bill of exceptions ; when necessary or proper.*—A bill of exceptions is not a part of the record proper, but is only made a part of the record by statute for the purpose of enabling the appellate court to revise rulings which are not shown by the record itself ; and its recitals as to matters which are a part of the record proper, but as to which the record itself is silent, can not be considered for any purpose.

2. *Motion in arrest of judgment ; on what grounds founded, and how revised.*—A motion in arrest of judgment must be founded on defects or errors apparent on the face of the record ; and when shown only by bill of exceptions, it can not be considered by this court.

FROM the Circuit Court of Bullock.

Tried before the Hon. H. D. CLAYTON.

The defendant in this case was indicted for petit larceny, in stealing \$14 in silver from one Clark ; pleaded not guilty to the indictment, and was tried on issue joined on that plea. A verdict of guilty was returned by the jury, and a fine of \$10 was imposed upon him, as shown by the judgment-entry, which is regular in form ; but a bill of exceptions, incorporated in the record, states the following facts : "This cause having been regularly submitted to a jury, the jury retired to consider their verdict ; and the court then took a recess for dinner, and instructed the sheriff to send for the presiding judge, if the

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jury should make up their verdict during the recess. During the said recess of the court, and in the absence of the presiding judge, the jury returned into the court-room, and, in the absence of the defendant and his counsel, and without their consent, handed their verdict to the clerk of the court, and were discharged by him, and left the court-room, and dispersed among the crowd. Thereupon, on the re-assembling of the court, the defendant made the following motion: "This day came the defendant, by his attorney, and moves the court to arrest the judgment, to set aside the verdict of the jury, and also to discharge the defendant, on these grounds: 1st, because the jury returned their verdict to the clerk of the court, and the same was received by the clerk, during the recess of the court, and said jury were discharged and separated, without the consent of said defendant; 2d, because defendant had no opportunity to poll said jury; 3d, because said verdict was received by the clerk during the recess, and in the absence of the court, and the jury were allowed to separate, without the consent of the defendant." The court overruled and refused said motion, but offered to arrest the judgment and grant a new trial; which the defendant declined, and excepted to the ruling of the court refusing to discharge him." None of these matters appear from the record, except as they are stated in the bill of exceptions; and a *certiorari* was not asked to bring up the motion in arrest, with the ruling thereon, as a part of the record.

H. C. TOMPKINS, and J. D. NORMAN, for appellant, cited *Hughes v. The State*, 2 Ala. 102; 1 Bishop's Crim. Pro. (ed. 1872), § 821, and authorities there cited; *Cook v. The State*, 60 Ala. 40; Code, §§ 4978, 4990.

T. N. McCLELLAN, Attorney-General, for the State, cited *Sparks v. The State*, 54 Ala. 82; *Morgan v. The State*, 48 Ala. 65; *Brown v. The State*, 52 Ala. 345; *Williams v. The State*, 48 Ala. 85; *Crocker v. The State*, 47 Ala. 53; *Banks & Wood v. The State*, 72 Ala. 522; Thompson on Juries, § 331; *Ex parte Knight*, 61 Ala. 482.

CLOPTON, J.—Section 4978 of Code 1876 provides: "Any question of law, arising in any of the proceedings in a criminal case, tried in the Circuit or City Court, may be reserved by the defendant, but not by the State, for the consideration of the Supreme Court; and if the question does not appear on the record, it must be reserved by bill of exceptions, duly taken and signed by the presiding judge as in civil cases." In civil cases, "any charge, opinion or decision of the court, touching the cause of action, and which would not otherwise

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appear of record," may be reserved by bill of exceptions, which, when signed by the presiding judge, becomes a part of the record.—*Code*, §§ 3107, 3108. The bill of exceptions does not become a part of the record until signed by the judge, and then only for the purpose of enabling the appellate tribunal to revise any decision of the primary court not appearing on the record. It forms no part of the record, which by law the court is required to keep.

Although a motion in arrest of judgment, before sentence, is of right in the defendant, it must be founded on defects apparent on the face of the record.—*Sparks v. State*, 59 Ala. 82; *Brown v. State*, 52 Ala. 345; *Bish. on Crim. Proc.*, §§ 1282-5. The record here meant is the record of the proceedings, orders and judgments, for the revision of which a writ of error was, by the common law, the appropriate remedy; or, as applicable in this State, of the pleadings, proceedings, papers, orders and judgments, which the clerk, by sections 572 and 671 of the Code, is required to keep. A motion in arrest of judgment must be founded on some defect apparent on the record, as it stands at the time the motion is made and ruled on.

The record, other than the bill of exceptions, does not show the defects on which the motion in arrest of judgment is made. In *Banks & Wood v. State*, 72 Ala. 522, the objection was made, that it did not affirmatively appear from the record that the defendants were present in court when the verdict was returned. It is said: "The objection is not sustained by the recitals of the record, which affirm their presence, and represent as a continuous, unbroken proceeding, the trial and all its incidents, until the sentence of the law was pronounced by the court. The recitals of the judgment-entry are contradicted and shown to be untrue, only by the bill of exceptions, which is not its legitimate function."

The motion in arrest of judgment, and the ruling of the court thereon, do not appear otherwise than from the bill of exceptions. It has been repeatedly held by this court, that it is not the appropriate office of a bill of exceptions to present for revision any matter which otherwise would appear of record. It will not be permitted to assume the office of the record, which the law requires the court to keep, where no bill of exceptions is resorted to, and on which it cannot trench. Any matter apparent on the record, as a defect in the indictment, sustaining a demurrer to any plea of the defendant, or overruling a motion in arrest of judgment, must be presented for revision by the record, without the aid of a bill of exceptions.—*Ex parte Knight*, 61 Ala. 482; *Petty v. Dill*, 53 Ala. 641. We can not pass on the ruling of the court, as it does not appear on the record. Affirmed.

[*Carlisle v. The State*; *Morrisette v. The State.*]

Carlisle v. The State.

Indictment for Obtaining Money under False Pretenses.

1. *Offer to refund.*—Under an indictment for obtaining money under false pretenses (Code, § 4370), evidence of the fact that the defendant offered, two or three weeks after the money was obtained, to refund it with interest, is not relevant or competent evidence for the defense.

FROM the Circuit Court of Pike.

Tried before the Hon. JOHN P. HUBBARD.

STONE, C. J.—The defendant was tried and convicted for obtaining money under false pretenses. He offered testimony tending the show, that, two or three weeks after the money was obtained, he offered to repay it, with some interest. This testimony was ruled out, and he excepted.

The testimony could not tend to disprove anything alleged against the defendant, nor was it part of the *res gestæ*, so as to shed light on the intent with which he uttered the pretense, alleged to be false and fraudulent. There is no error in the record.

Affirmed.

Morrisette v. The State.

Indictment against Agent for Embezzlement of Property.

1. *Former jeopardy.*—When a judgment of conviction in a criminal case has been arrested, set aside, or reversed on error or appeal, at the instance of the defendant, it can not be pleaded in bar of another prosecution for the same offense, such action on his part being regarded as an express waiver of his constitutional privilege not to be placed in jeopardy a second time.

2. *Larceny or embezzlement; criminal intent as element of offense.*—Since a criminal intent, or *animus furandi*, is a necessary element of the crime of larceny, a person can not be convicted of larceny (or embezzlement), if he takes the property of another under the honest belief that it is his own; but “an impression that he had a claim or property in it,” is not the equivalent of an honest belief, and does not negative a criminal intent.

[Morrisette v. The State.]

3. *Sentence to hard labor for costs; amendment of clerical misprision.*— A sentence to hard labor for the non-payment of costs amounting to \$53.95, at forty cents per day, should be for only one hundred and thirty-four days, the fraction over being excluded; but a judgment in excess of this number of days, being a clerical misprision, will be corrected without a reversal.

FROM the Circuit Court of Dallas.

Tried before the Hon. JOHN MOORE.

The first count in the indictment in this case, on which alone a conviction was sought and had, charged that the defendant, "being at the time the agent of C. J. Gayle, embezzled, or fraudulently converted to his own use, an ox, of the value of twenty-six dollars, the personal property of C. J. Gayle, which was at the time in his possession as said agent." A second count charged embezzlement by a servant, and the third larceny of the ox. The defendant filed a special plea of former jeopardy, setting out the proceedings had against him under an indictment for the alleged larceny of the ox; which indictment was found in the City Court of Selma, and, having pleaded not guilty, a verdict of guilty was rendered against him; but a new trial was granted on his motion, and the case was afterwards transferred, by consent, to the Circuit Court. These facts were shown by the transcript of the proceedings in that case, as set out in the plea; and the record further shows that, on the day after the filing of this plea, a judgment of *nolle-pros.* was entered in that case. The court sustained a demurrer to this special plea, and the cause was tried on issue joined on the plea of not guilty.

On the trial, as the bill of exceptions shows, said C. J. Gayle testified, as a witness on the part of the State, that the defendant had been his tenant for several years, on a plantation in said county on which he had a good many cattle: "that he put all his said cattle in the possession of the defendant, under an agreement between them that he, defendant, was to manage, control, and take care of them for him, and, in consideration thereof, was to have the right to milk the milch cows, and to have the milk and butter so obtained for his own use, and was to have the use of such oxen as could be worked;" also, that he afterwards missed an ox from his cattle, and, from information obtained from other persons, found it in the possession of another person, and reclaimed it. Another witness for the State, a merchant, testified that he bought the ox from the defendant, who brought it to his store and offered to sell it to him; and that he sold it to the person in whose possession it was afterwards found by said Gayle. The defendant made a statement to the jury in his own behalf, and said that, by the terms of the agreement between him and Gayle, he was to

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manage, control, and take care of the cattle, "and, for his services, was to have one half of the cattle so turned over to him by Gayle, and one half of the increase thereof during the time they were under his charge;" that Gayle, as his landlord, was also to advance necessary supplies to him and his family, but failed to do so; that he notified Gayle, if the necessary supplies were not furnished, that he would sell some of the cattle, and afterwards sold the ox for the purpose of getting supplies for himself and family; that the ox was calved after he had taken charge of the cattle under his contract with Gayle, "and that he was the owner of an undivided one-half of the ox so sold by him." Gayle, being afterwards examined in rebuttal, denied these statements as to the terms of the contract between him and the defendant.

The court charged the jury, among other things, "that if they believed the defendant owned an undivided half interest in said ox, or honestly believed that he did own one half of said ox, they must acquit him; or, if there was a reasonable doubt in their minds on either of said points, they must acquit the defendant." The defendant afterwards asked the court, in writing, to charge the jury as follows: "If the jury believe, from the evidence, that the defendant had an impression that he had a claim or property in the ox at the time he sold him, then the jury can not convict." The court refused this charge, and the defendant excepted to its refusal. The defendant asked another charge also, in these words: "When the proof shows that one of two cows in the same herd belonged to the defendant, and he intended to take his own, but it is doubtful which he did take, the jury must acquit; that such a case would be trespass, and not embezzlement." The court refused this charge, and the defendant excepted to its refusal.

The judgment of the court, after sentencing the defendant to hard labor for the county for two years, as a punishment for his offense, adds: "It is further considered by the court, that said Bland Morrisette be confined at additional hard labor for said county, for an additional term of one hundred and forty-five days, at the rate of forty cents per day, to pay \$53.95, the costs of this prosecution."

G. A. ROBBINS, for the appellant, cited *Berry v. The State*, 71 Ala. 307; *Randle v. The State*, 49 Ala. 14; 1 Hale's P. C. 502; Roscoe's Crim. Ev. 644, 7th Amer. ed.; *McMullen v. The State*, 53 Ala. 531.

T. N. McCLELLAN, Attorney-General, for the State, cited *Baysinger v. The State*, at the present term; and *Kendall v. The State*, 65 Ala. 492.

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SOMERVILLE, J.—Where a defendant has once been convicted under an indictment for a criminal offense, and this judgment of conviction has been set aside on motion for a new trial, or has been arrested, or reversed on appeal or writ of error, this is not regarded as a putting of the accused in legal jeopardy, so as to protect him against a second trial upon the same charge subsequently preferred against him. Such action, being taken at the instance of the accused, is an express waiver of his constitutional privilege not to be placed in jeopardy a second time for the same offense.—*Kendall v. The State*, 65 Ala. 492; *Jeffries v. The State*, 40 Ala. 381; Cooley's Const. Lim. (5th Ed.), 401-402; Wharton's Cr. Pl. & Pr. (8th Ed.), § 510. The plea of former jeopardy showed that a new trial had been granted, and the first judgment of conviction had been set aside on motion of the defendant. It was, for this reason, defective, if not for other reasons needless to be mentioned, and the demurrer to it was properly sustained.

2. The crime of larceny can not be perpetrated without a criminal intent—an *animus furandi*, or intent to steal. Where one, therefore, takes the property of another, honestly believing that he has a legal right to it—or, in other words, under a *bona fide* claim of right—there can be no larceny, although the taking may constitute an inexcusable trespass. *Morningstar v. The State*, 55 Ala. 148; 2 Bish. Cr. Law, (7th Ed.) § 851; Roscoe's Cr. Ev. (7th Ed.) 646*; *Johnson v. The State*, 73 Ala. 523. If the first charge requested by the defendant had asserted this principle, it would have been a proper exposition of the law. It is not sufficient, however, for the taker to have a mere "impression" that he has a claim of right to property, in order to exempt him from the charge of larceny in the taking of it. This might amount to a vague notion, unaccompanied with honesty of conviction. The charge was erroneous in asserting this proposition, and its refusal was free from error.

There was no evidence tending to support the second charge requested by the defendant, and it was properly refused because abstract.

3. We discover, however, a clerical error in that part of the judgment which fixes the additional term of imprisonment to pay costs. It is apparent, from mathematical calculation, that this period should be one hundred and thirty-four days instead of one hundred and forty-five, as stated in the judgment. We omit from this a fraction of seven-eighths of a day additional, in view of the rule that the law takes no cognizance of mere fractional parts of a day, in cases of this character. This much is due to that strict construction of penal laws which is universally held to prevail, always working favorably to the liberty of

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the citizen. This error will be corrected in this court, at the cost of the appellant; and, as thus corrected, the judgment will be affirmed.

There is nothing in the exception taken to the only ruling of the court made on the admission of evidence, and we do not understand it to be insisted on by counsel.

Judgment affirmed.

Henry v. The State.

Indictment for Robbery.

1. *Challenge of juror for cause; waiver of right.*—The officer before whom the preliminary examination of the defendants was had, and by whom they were committed to jail to await the action of the grand jury, being summoned as a regular juror, and being accepted without objection, after examination by the court, in the presence of the defendants, touching his qualifications as a juror; whether the failure to challenge him was the result of ignorance or inadvertence, the right of challenge was lost when he was accepted and sworn as a juror; and a subsequent motion to excuse or set him aside, on his own statement of the facts to the court, saying that he had not recognized the defendants when first examined, and that he had a fixed opinion which would bias his verdict, is addressed to the discretion of the court.

FROM the Circuit Court of Jefferson.

Tried before the Hon. S. H. SPROTT.

The defendants in this case, John Henry and Isaac Nobles, being on trial under an indictment for robbery, reserved a bill of exceptions, as follows: "The defendants having been duly arraigned, and entered their plea of not guilty, and after the jury were duly impanelled and sworn according to law, and after the indictment was read, but before the defendants' plea was made known to the jury; one of the twelve jurors, A. S. Elliott, asked leave of the court to make an explanation, and, his request being granted, he thereupon stated that, when answering the questions propounded to him on his examination *voir dire*, he did not recognize the defendants, but did recognize them after the jury had been impanelled and sworn; that he had a fixed opinion as to their guilt or innocence, which would bias his verdict; that he, as mayor of Birmingham, presided in the Mayor's Court when the defendants were arraigned and tried in said court for this same offense, and committed them to jail to await the action of the grand jury. Thereupon, the defendants objected to said Elliott sitting as a juror on the trial of this case; but the court overruled the objection, on the

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ground that it came too late; to which ruling the defendants excepted."

The name of the appellants' counsel, if any appeared in this court, is not shown by either the record or the docket; and there is no brief on file.

T. N. McCLELLAN, Attorney-General, for the State, cited *Smith v. The State*, 55 Ala. 6; *Stalls v. The State*, 28 Ala. 25; *Roberts v. The State*, 68 Ala. 52; *State v. Morea*, 2 Ala. 275; *State v. Williams*, 3 Stew. 457; *Rash v. The State*, 61 Ala. 94; *Bales v. The State*, 63 Ala. 36; *Battle v. The State*, 54 Ala. 94.

CLOPTON, J.—The constitution guarantees to the accused, in all criminal prosecutions, a "speedy public trial, by an impartial jury of the county or district in which the offense was committed." To secure this right, statutes have been enacted defining the qualifications of jurors, and providing modes by which their qualifications may be ascertained. The due and proper administration of the law—on the one hand protecting the public against the commission of crime, and on the other shielding innocence from passion and prejudice—materially depends on the fitness, competency, and impartiality of jurors. They are required to be persons who are competent to discharge the duties "with honesty, impartiality, and intelligence, and are esteemed in the community for their integrity, fair character, and sound judgment."

For the trial of a person charged with an offense which may be punished capitally, the court must make an order, commanding the sheriff to summon not less than fifty, nor more than one hundred persons, including those summoned on the regular juries for the week. A designated number of peremptory challenges is allowed to the State, and to the defendant, and, in addition, grounds of challenge are prescribed, so that disqualified persons may be challenged for cause. Among these grounds of challenge is a fixed opinion as to the guilt or innocence of the defendant, that would bias his verdict. This ground of challenge can be proved by the oath of the person alone. When the name of a person summoned is drawn from the box, in which have been placed the names of all summoned, he is examined by the court touching his qualifications; and if found qualified, is put, first on the State, and then on the defendant; and if accepted by both, he is sworn for the trial of the case. When accepted by the State, and put on the defendant, is his opportunity and right to challenge.

While it is of first importance that the right of both the State

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and of the defendant to a trial by an honest, intelligent and impartial jury, should be jealously maintained, the necessity of guarding against other evils, readily suggested, requires a time fixed, when the *right* to challenge shall cease. By the uniform rulings of this court, the right to challenge ends, when the persons selected are sworn as jurors for the trial of a case punishable capitally. "After the ceremony of the administration of the oath is commenced, the right of challenge for existing cause is lost, alike to the State and to the defendant."—*Smith v. State*, 55 Ala. 1; *Stalls v. State*, 28 Ala. 25; *Roberts v. State*, 68 Ala. 515; *Rash v. State*, 61 Ala. 89; *State v. Morea*, 2 Ala. 275.

Due caution should be observed, that none but those free from an opinion which would bias their verdict shall serve as jurors. A list of the persons summoned was served on the defendants before the day of trial; the juror was examined as to his qualifications by the court, in the presence of the defendants; and he was the officer, who presided on the preliminary examination, and committed them for further trial. By reasonable diligence, they could have known his disqualification. But, whether the omission to challenge was from inadvertence or ignorance, the right to challenge was lost when the juror was sworn; after which, excusing the juror, at the request, or on motion of the defendants, rested in the discretion of the court. The remedy of the defendants, after conviction, was a motion for a new trial.

Affirmed.

Henderson v. The State.

Indictment for Murder.

1. *Self-defense*.—A conspiracy on the part of the deceased and another to take the life of the defendant, and an attempt to carry it into effect, do not justify the killing on the ground of self-defense, unless the attempt was attended with an actual or seeming ability to effect its purpose, and the danger was, or appeared to be, so imminent that it could not be otherwise eluded, or, at least, could not be eluded by flight, or other attempted escape, without exposing the party assailed to greater peril.

2. *Same; retreat*.—A charge requested, which instructs the jury that they must acquit the defendant, "if they believe from the evidence that the circumstances at the time of the killing were such as to create in the mind of the accused a reasonable belief of imminent danger to life or limb caused by the deceased," is properly refused, because it "pretermits all mention of other modes of escape which may have been open to

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the defendant, and to which, if available, it was his duty to have resorted before taking life."

FROM the Circuit Court of Pike.

Tried before the Hon. JOHN P. HUBBARD.

The defendant in this case, Jack Henderson, was indicted, jointly with Aaron Perdue, for the murder of Dave Mincey, by shooting him with a gun ; pleaded not guilty, was tried on issue joined on that plea, was convicted of manslaughter in the first degree, and sentenced to the penitentiary for the term of three years and six months. The bill of exceptions purports to set out "substantially all the evidence adduced in the case," but it is not necessary to state it at length. It appeared that the killing took place about twelve o'clock at night, at a house where a number of people were assembled, and engaged in dancing. The witnesses for the State testified, in substance, that the deceased was standing, just before the killing, near the back door of the back room of the house, talking with one Siler, while Aaron Perdue stood near by, having a breech-loading rifle in his hands ; that Perdue handed the rifle to Jack Henderson, the defendant, "who stepped out of the back door, spoke in a loud voice, '*Get out of the way, or I will shoot you,*' and immediately fired the gun at the deceased," the ball striking him in the breast, and inflicting a wound from the effects of which he died the next day ; "and that the deceased and the accused were perfectly friendly, and had never had any difficulty or quarrel in their lives before the killing took place." The State proved, also, the defendant's confessions, made after the killing, "that he shot the deceased because he was afraid of him, for the reason that the Minceys had cut him to pieces once before." Two witnesses for the defendant, who were present at the house on the night of the killing, testified that, a short time before the deceased was killed, they heard him, with his two brothers and another person, "talking together in a low tone of voice in the yard just in front of the house, and heard said Dave Mincey and Jim Mincey say, '*We will go into the house where Jack Henderson is playing the fiddle, and tramp on his toes, and push his fiddle, to get up a fuss with him, and cut him to pieces ;*' that said Dave and Jim Mincey went into the house where said defendant was playing the fiddle, and danced near him, but they (said witnesses) did not know whether they tramped on his toes, or pushed his fiddle, or not ; and that they saw said defendant, soon afterwards, running from the front room into the back room, pursued by said Dave and Jim Mincey, the former cutting at him with a knife." Other witnesses for the defendant, who were in the back room at the time of the difficulty, "testified that Jack Henderson ran from the front into

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the back room, pursued by Dave Mincey and Jim Mincey, who were running after him, and Dave Mincey cutting at him with a knife; that Henderson, when near the back door, threw up his hand to fend off the licks of Dave Mincey, and was cut on the hand; that he snatched the gun from the hands of Perdue as he passed, jumped out of the back door, and fired at said Dave Mincey, who was at the time standing near the back door, with one foot on the floor, and the other on a large block used as a step, and having his knife in his right hand at the time."

The defendant requested the following charges to the jury, in writing: "(4.) If the jury believe, from the evidence, that the deceased and his brother, Jim Mincey, had conspired together to inflict great bodily harm on the defendant, or to kill him, and that the deceased was attempting to carry out that common purpose at the time the fatal shot was fired, they must find the defendant not guilty." "(5.) If the jury believe, from the evidence, that the circumstances at the time of the killing were such as to create in the mind of the accused a reasonable belief of imminent danger to life or limb caused by the deceased, they must find the defendant not guilty." The court refused each of these charges, and the defendant duly excepted to their refusal; and these are the only rulings presented by the bill of exceptions.

The name of the appellant's counsel, if any appeared in this court, is nowhere shown by the record or dockets.

T. N. McCLELLAN, Attorney-General, for the State.

STONE, C. J.—Charges four and five, asked for defendant, were severally refused, and the defendant excepted severally. Each is faulty. A conspiracy to take life, and an attempt to carry it into effect, do not, without more, justify the taking of the life of the person thus attempting. Such attempt, to justify a killing, must be attended with an actual or seeming ability to carry it into effect; and the danger must be, or appear to be, so imminent, as that it can not be otherwise eluded, or, at least, can not be without exposing the party assailed to increased peril, by flight, or other attempted escape. Life must not be taken, except in extreme cases, when there is no other apparent means of escape from what appears to be imminent peril to life or limb. Less than this does not meet the conditions of self-defense.—*Mitchell v. The State*, 60 Ala. 26; *DeArman v. The State*, 71 Ala. 351; *Storey v. The State*, *Id.* 329. The fifth charge asked pretermits all mention of other modes of escape, which may have been open to defendant, and which it was his duty to have resorted to, if available, before taking life.

Affirmed.

Chambers v. The State.

Indictment for Betting at Cards.

1. *Playing at cards, and betting; variance.*—Under an indictment for betting at a game of cards (Code, § 4209), a conviction can not be had on proof of playing only (§ 4207), the two offenses being separate and distinct.

FROM the Circuit Court of Crenshaw.

Tried before the Hon. JOHN P. HUBBARD.

The indictment in this case, as copied in the transcript, charged that the defendant “bet at a game with cards, or dice, or some other device or substitute for cards or dice, at a tavern, inn,” &c. The bill of exceptions purports to set out all the evidence adduced on the trial, and shows that the case was treated as an indictment for playing cards at some place designated in the statute; the only contested questions being, what acts on the part of the defendant amounted to playing, and whether the cabin at which the game was played was within the prohibition of the statute. On all the evidence, the defendant requested the court to charge the jury, among other things, that they must find him not guilty, if they believed the evidence; and he excepted to the refusal of this charge.

The record and dockets do not show any appearance of counsel for the appellant in this court.

T. N. McCLELLAN, Attorney-General, for the State.

SOMERVILLE, J.—The Circuit Court erred in this case, in refusing to give the general charge requested by the defendant, instructing the jury to acquit him if they believed the evidence. The indictment charges the defendant with *betting* at a game with cards, in violation of the provisions of section 4209 of the Code, at one of the places therein prohibited. This offense is a misdemeanor, punishable by a fine of not less than fifty, nor more than three hundred dollars. It is a separate and distinct offense from that of *playing* at a game with cards, denounced by section 4207 of the Code, which is punishable by a fine of not less than twenty, and not more than fifty dollars. The latter offense is not included necessarily in the former, because one may bet at a game played by others. A conviction of *play-*

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ing can not, therefore, be had under an indictment for *betting*. There is no evidence tending to show that the defendant *bet* any thing at the alleged game with cards. The variance between the allegations and the proof was fatal to the right of any legal conviction.

We need not consider the other points raised by the rulings of the court,

The judgment is reversed, and the cause remanded.

Pippen v. The State.

Indictment for Malicious Trespass on Land.

1. *Malicious trespass on lands; constituents of offense.*—To justify a conviction against a person who “willfully and maliciously commits any trespass on the lands of another, by cutting down or destroying any wood or timber growing thereon” (Code, § 4417), something more than a mere willful trespass must be shown—the act must be willful and malicious; and while malice is not, ordinarily, the subject of positive proof, facts and circumstances must be shown from which it may be inferred that the act was prompted by ill-will, malevolence, grudge, spite, enmity, or wicked intention.

2. *Same.*—Where the evidence shows that the trees were cut by the defendant, by the direction of his employer (or his employer’s wife, in his absence), who wanted rails to repair a fence, and who told him that he might sell the bark; that his employer owned a strip of the land, having bought from the prosecutor, and that the line between them had never been run, although the prosecutor had pointed out the line as he claimed it, and told defendant he must not cut any trees beyond it; these facts, without more, do not justify the inference of malice, and do not authorize a conviction.

FROM the Criminal Court of Greene.

Tried before the Hon. J. P. McQUEEN, an attorney of the court, selected by the clerk (Code, § 664) on account of the disqualification of the presiding judge.

SEAY & DEGRAFFENREID, and J. B. HEAD, for appellant.

T. N. McCLELLAN, Attorney-General, for the State.

CLOPTON, J.—The defendant was indicted under section 4417 of Code, which provides, that “any person who willfully and maliciously commits any trespass on the lands of another, by cutting down or destroying any wood or timber growing thereon,” is guilty of a misdemeanor. It was not the intention, by the statute, to constitute every trespass on the lands of an-

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other, where wood or timber was cut down or destroyed, a criminal offense. It is not sufficient that the trespass is willful; it must also be malicious. In *Johnson v. State*, 61 Ala. 9, it is said: "The controlling words are, *willfully* and *maliciously*. No matter how inexcusable the trespass, the criminal offense is not made out, unless the act is willfully and maliciously done." Ordinarily, malice is not the subject of positive proof, but of inference from proved facts and circumstances—facts and circumstances from which it may be inferred that the commission of the act was prompted by "ill-will, malevolence, grudge, spite, wicked intention, enmity;" and in a criminal case, the inference should not be the subject of reasonable doubt.

We have carefully examined the evidence, and have failed to find any facts or circumstances proved, from which malice may be inferred. The facts, in respect to the commission of the offense, testified to by the owner of the land, are, that he had several times told defendant where the line was, and that he must not cut timber beyond ten steps from a certain old fence-row; that beyond this row several trees were cut down, and defendant had stated to him that he cut them down, and knew they were on the land of the witness, and had exchanged the bark for a pair of boots. These facts may show a willful trespass, but are not indicative of malice, in the absence of all evidence of any previous cutting timber, and persistence therein after notice, or of any ill-will or inimical feeling, or of any other circumstance manifesting that the trees were cut from grudge, spite, or any like motive, or that any injury, other than the loss of the trees, was caused. Conceding these facts, they tend to show that the cutting was done for the purpose of gain, rather than from any motive or desire to injure the owner.

It further appears that the defendant was in the employ of the adjoining proprietor, who had bought land from the alleged owner of the trees, and that the line between them had not been definitely run. The employer was absent, and his wife, who had charge of his business in his absence, testified, that by her instructions the defendant went on the lands, and cut the trees for the purpose of splitting rails to repair a fence; that she told him he could have the bark, and sell it; that the trees were cut on or near the spot where her husband had previously cut house-logs, and that she recognized the land as being as much the property of her husband as of the alleged owner. These facts tend to show that the trees were cut by her direction, under a claim of right, and repel the inference of malice on the part of defendant. Doing an unlawful act willfully and without excuse may, ordinarily, authorize an inference of malice; but, under the statute, "the act, although intentional, and unlawful, is nothing more than a civil injury, unless accompanied with that

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special malice which the words 'willful and malicious' imply." *Com. v. Williams*, 110 Mass. 401.

Reversed and remanded. Defendant will remain in custody, until discharged by due course of law.

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Indictment for Forgery.

1. *Relevancy of evidence as to amount due to defendant by drawer of forged order.*—Under an indictment for forgery in falsely altering and raising an order for merchandise, evidence of the fact that, at the time the order was given, the drawer owed the defendant more than the sum specified in the order, is not relevant or admissible for any purpose.

FROM the Circuit Court of Choctaw.

Tried before the Hon. WM. E. CLARKE.

The indictment in this case charged that the defendant, Wash Bush, "falsely, and with the intent to injure or defraud, did forge an order, purporting to be the act of one W. H. Curtis;" which order was set out in the indictment, being dated July 30th, 1884, directed to J. E. Westcott, and in these words: "*Pleas let Wash Bush trad in your store to the amount of*" —, "*and charge the same to my account.*" The amount expressed in the order was written in figures, which appeared to have been altered, appearing to be \$1.00; the figures above the ciphers having been erased, and the figures 90 added after the ciphers. Curtis, by whom the order was written, testified as a witness for the State, that the sum specified in the order, as written, was \$1.30, or \$1.35; while Westcott, to whom it was presented by the defendant, testified that the defendant said it was intended for \$1.90, and that he delivered goods to that amount on the faith of it. The defendant offered to prove that the amount due from Curtis to one Prince Bush, defendant's brother, for which debt the order was given, was \$2.40; and he excepted to the exclusion of this evidence.

The record and dockets do not show that any counsel appeared in this court for the appellant.

T. N. McCLELLAN, Attorney-General, for the State, cited *Kimball v. The State*, 50 Maine, 409; *Amer. Crim. Law*, 150 d.

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STONE, C. J.—It would seem that the act which constituted the crime of which the defendant was found guilty, was the false alteration and raising of an order for merchandise, from a smaller to a larger sum, “with the intent to injure or defraud.” The testimony offered in defense, and which was ruled out, would have tended to show that Curtis, who drew the order, owed the defendant a greater sum than the order called for, either at the time it was drawn, or after it was raised. There was no error in ruling this evidence out. It could not tend to show any authority to alter the order, could not tend to disprove the alleged alteration, and could not shed any light on the defendant’s intent, if he did alter and raise the order, as charged.

There is no error in the record, and the judgment of the Circuit Court must be affirmed.

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Prosecution for Enticing Minor from Service of Employer.

1. *Enticing minor from service of employer ; constituents of offense.* Under the statute amending section 4325 of the Code, and providing, among other things, that any person “who knowingly interferes with, hires, employs, entices away, or induces any minor to leave the service of any person to whom that service is lawfully due,” &c., is guilty of a misdemeanor ; a conviction can not be had against a father, who, having hired his minor son to another person for a specified term, induces his son to leave the service before the expiration of the term. (STONE, C. J., doubting.)

FROM the County Court of Macon.

Tried before the Hon P. S. HOLT.

This prosecution was commenced by an affidavit made and subscribed before the judge of said court by one W. W. DuBose, who therein stated “that Joe Driscol did knowingly interfere with, hire, employ, entice away, or induce George Driscol, a minor, to leave the service of R. E. DuBose, to whom the service of said minor was lawfully due, without the consent of said R. E. DuBose, given in writing, or in the presence of some credible person.” The defendant pleaded not guilty to the charge, and claimed a trial by jury ; and the jury returned a verdict, under the charge of the court, finding him guilty, and assessing a fine of fifty dollars. It appeared on the trial, as the bill of exceptions shows, that the defendant, on the 11th February, 1885, hired his minor son, George Driscol, then about fifteen or sixteen years old, to said R. E. DuBose, for

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the remainder of the year 1885, at \$6.00 per month, the contract being reduced to writing, signed by the parties, and attested by two witnesses; that the defendant, about one month afterwards, went on the plantation of said DuBose, and induced George to leave his service, representing that he needed his assistance in the cultivation of his own crop; and that this was done against the protest and remonstrance of said DuBose. On this evidence, the court instructed the jury, if they believed the evidence, they must find the defendant guilty; to which charge the defendant duly excepted.

BREWER, CHILTON, and BARNES, for the appellant.

T. N. McCLELLAN, Attorney-General, for the State.

CLOPTON, J.—The act amendatory of section 4325 provides, “Any person who knowingly interferes with, hires, employs, entices away, or induces to leave the service of another, any laborer, or servant, who has contracted in writing to serve such other person for any given time not to exceed one year, before the expiration of the time so contracted for, or who knowingly interferes with, hires, employs, entices away, or induces any minor to leave the service of any person to whom such service is lawfully due, without the consent of the party employing, or to whom such service is due, given in writing, or in the presence of some credible person, is guilty of a misdemeanor, and, on conviction, may be fined not less than fifty dollars, nor more than five hundred dollars, at the discretion of the jury trying the cause, and in no case less than double the damages sustained by the party whom such laborer or servant was induced to leave; one half to the party sustaining such damage, and the other half to the county.”—Acts 1880-81, 42. The record presents the question, whether a father, who contracts in writing with another person, that his minor son shall serve him for a specified time, and before the expiration of the time, takes him from the service of such other person, without his consent, is guilty of violating the statute.

Section 4325 of Code, before amended, did not provide for the case of a minor. In respect to a laborer or servant, who had contracted in writing, the section contained the qualifying expression; “*such contract being in force, and binding upon the parties thereto.*” On this provision, it was held that, an infant’s contract being voidable at his election, a person who employed him, after a disaffirmance of his contract of service, was not guilty of a violation of the statute.—*Langham v. State*, 55 Ala. 114. One of the purposes of the amendatory act was to

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avoid this judicial construction of the statute. The qualifying provision was omitted, thus making the offense, in this respect, dependent upon the mere existence of a contract in writing, and disembarassing it of the consideration of the element of "being in force, and binding upon the parties thereto." Under the first clause of the amendatory act, a father would be guilty of its violation, who interfered with, hired, employed, enticed away, or induced to leave the service of another, his minor child whom he had emancipated, and who had contracted in the statutory mode. But he is not guilty, if, not having emancipated his child, he asserts his parental authority, and reclaims the service due him prior to, and at the time of the minor's contract with such person.—*Turner v. The State*, 48 Ala. 549. The purpose of the statute is to prevent and prohibit strangers—persons having no interest or authority—from interfering with such contracts of infants, and inducing them to disaffirm them; but not to interfere with the proper and lawful exercise of parental authority and rights. Also, enlarged provisions were enacted specially applicable to minors, who legally owed service to another, being cases not included in the first clause. Under these provisions, a contract in writing is not an essential element of the offense. The statute extends to cases where service is due from a minor to another by operation of law. Its terms are comprehensive enough to embrace cases where service is due to another by contract between the father and such other person.

Conceding that service was legally due to DuBose by the minor son of the defendant, in the meaning of the statute, the question remains, was the defendant, in taking his son away from the service of the person with whom he had contracted, guilty of the offense created by the statute? It will be observed, that where the contract is made by the laborer or servant himself, the penalty of the statute is not directed against the *laborer* or *servant*, who may leave the service of his employer, and refuse to perform his contract. In such case, the employer is left to his civil action for a breach of contract. The legislative intent is to prohibit interference by intermeddlers and interlopers. There are no words indicating a different intent in respect to minors. In case of contracted labor, the term of service is restricted, so as not to exceed one year. There is no limitation in the case of a minor, short of majority. The primary intention is to prevent interference with the service due by an apprentice to his master, a child to the parent, or to any other person standing *in loco parentis*.

The statute also provides, that, in no case of conviction, shall the fine be less than *double* the damages sustained by the party whom such laborer or servant was induced to leave, *one half*

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to the party sustaining the damage—thus providing full compensation. While the statute converts a civil injury into a criminal offense—an unlawful interference with parties in performing such contracts, or rendering service legally due, into a tort committed by a person not a party to the contract—it is not the object, and is not within the spirit of the statute, to try and determine, by means of criminal proceedings, and the administration of the criminal law, the validity of contracts, or their breach, or to enforce the payment of the damages occasioned thereby. The power of the legislature to put the machinery of the criminal law into operation, to compel, by imprisonment and hard labor, compensation for damages sustained by the breach of a contract, is of doubtful constitutionality. *Ex parte Hardy*, 6S Ala. 303. A construction should be avoided that will make the statute of doubtful constitutionality, and we are constrained to hold that none of its provisions apply to the contracting party. This construction harmonizes with the rule, that penal statutes shall be so construed as not to include cases without the spirit, though within the letter, and promotes the apparent policy and object of the legislature, as collected from the entire statute.

Reversed and remanded.

STONE, C. J.—I doubt the correctness of the foregoing opinion.

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Indictment for Carrying Concealed Weapons.

1. *Charge as to evidence for consideration of jury.*—Under an indictment for carrying concealed weapons (Code, § 4109), the witnesses for the prosecution testifying that they saw the defendant with a pistol in his hand, presenting it at another person, but did not see how or whence he procured it, although they had been working with him for several hours; while the defendant himself stated to the jury that it was placed on a car which he was using, by a friend, who informed him of threats made by the person with whom he had the difficulty, and was picked up from the car at the moment; a charge requested, asserting that the jury, “in determining whether the defendant got the pistol from his person or elsewhere, can take into consideration his surroundings,” is correct, and its refusal is error.

FROM the Circuit Court of Jefferson.

Tried before the Hon. S. H. SPROTT.

[Alsop v. The State.]

The defendant in this case, being on trial under an indictment which charged him with carrying a pistol concealed about his person, reserved a bill of exceptions as follows: "The State introduced evidence which tended to show that, within twelve months before the finding of the indictment, and in said county, the defendant was seen by the witnesses with a pistol in his hand, which he presented at a negro with whom he had a difficulty at the time; that none of them saw where the pistol came from, and they did not know whether the defendant had taken it from about his person or not; that defendant was then working at the *Alice Furnace*, where the witnesses were also working; that they had been around and about him for several hours, and had talked with him, but had seen no pistol about him up to the time it was presented and fired; that this was at night, but the light was bright enough for them to see how to carry on their work, and to see an iron rod or pistol several feet; that defendant had on no coat, but wore a short jacket, which reached no lower than his waist, and had on his pants; that several negroes, who were witnesses, were around and about him, and there was a trestle also by him, and near the parties quarreling, before and up to the time the pistol was fired; that the pistol, when the witnesses first saw it, was in the hand of the defendant, presented at a negro; and that the defendant was standing near his cab, which was loaded with ore, and which was about waist high. The defendant said, in his statement to the jury, that he had the pistol lying on his cab, and picked it up from his cab, and did not have it about his person; and that a man came along by where he was at work, and told him a certain negro was making threats against him, and put the pistol on his cab for him. This being, in substance, all the testimony in the case, and also the substance of the defendant's statement, the defendant asked the court, in writing, to instruct the jury as follows: 'The jury can take into consideration the surroundings of the defendant, in determining whether he got the pistol from his person or elsewhere.' The court refused to give this charge, and the defendant excepted to its refusal."

The name of the appellant's counsel, if any appeared in this court, is nowhere shown by the record or docket.

T. N. McCLELLAN, Attorney-General, for the State.

STONE, C. J. — In testing the credibility of narrations of fact, it is, as a rule, permissible to consider the surroundings, or attendant circumstances. Especially is this the case, when, as on the present trial, there was no positive testimony of the main

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fact, but it was left to be inferred from proof of other facts. The charge asked should have been given.—Sackett, Instruction to Juries, 474-5.

Reversed and remanded. Let the defendant remain in custody, until discharged by due course of law.

Russell v. The State.

Indictment for Retailing Liquor without License.

1. *License for retailing liquors ; pre-requisites of, and power of probate judge in issuing.*—In issuing a license for retailing spirituous liquors, under the general statutes, a probate judge acts ministerially, and is bound to require a substantial compliance with all the precedent statutory conditions ; and while the license itself is *prima facie* evidence of such compliance, the fact of non-compliance, when affirmatively shown, renders the license void ; and its invalidity being thus shown, it affords no protection to the person to whom it was granted, and who has acted under it.

2. *Same ; affidavit of applicant.*—The statutory affidavit required of a person applying for a license to retail spirituous liquors (Sess. Acts 1882-3, pp. 36-7), must state, among other things, that the applicant will not knowingly sell or give away vinous or spirituous liquors to any person of known intemperate habits, and will not keep his house open on Sunday for the purpose of carrying on the business ; and if the affidavit omits these statements, it does not authorize the issue of a license, and the license itself is void.

FROM the Circuit Court of Bullock.

Tried before the Hon. H. D. CLAYTON.

The indictment in this case charged, in the first count, that the defendant, “not having first procured a license as a retailer from the proper legal authority under the revenue laws, did sell vinous or spirituous liquors, which, or a portion thereof, was drunk on or about his premises ;” and in the second count, that, not having procured such license, he “did sell vinous or spirituous liquors in quantity less than one quart.” On the trial, as the bill of exceptions shows, issue having been joined on the plea of not guilty, the State proved that, on the 7th February, 1885, “in James, an incorporated town in Bullock county, the defendant sold whiskey in quantity less than one quart, and permitted it to be drunk on the premises in his bar-room ;” and the defendant then offered in evidence his license as a retailer, which was signed by the probate judge of the county, was dated January 6th, 1885, and in regular form. The State then offered in evidence, in rebuttal, the recommendation of householders

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on which said license was issued, and the defendant's affidavit before the probate judge preceding its issue; and these papers were admitted in evidence by the court, against the defendant's objection. It was admitted that this recommendation, which was a printed form with blanks, was furnished to the defendant by the probate judge, the blanks being filled up when it was returned; and that the affidavit also, which was a printed blank form, "was furnished by the probate judge, on application of the defendant to take the necessary oath to engage in retailing." The recommendation, which stated that the signers were "householders and freeholders residing within five miles of the town of James," was signed by twenty-one persons, of whom only five resided in the town; and it was shown that "not more than twelve householders and freeholders resided in said town at the time said recommendation was signed." It was admitted, also, that the probate judge was acquainted with the several signers and their residences, and was well acquainted with the town and neighborhood. The affidavit was in these words: "I, M. S. Russell, do solemnly swear, that I will not knowingly sell or give away any vinous or spirituous liquors, to any minor, or person of unsound mind, without the permission of his or her parent or guardian; that I will not violate the act approved February 20th, 1875, to prohibit the disposing of agricultural products between the hours of sunset and sunrise; nor will I suffer the same to be knowingly done by any partner, clerk, agent, or any other person on or about my premises, if within my power to prevent the same; and that I will not allow any gaming, of any kind, on or about my premises." These being the material facts, the court charged the jury, that, if they believed the evidence, they must find the defendant guilty; to which charge the defendant duly excepted.

NORMAN & SON, and POWELL & CABANISS, for the appellant.

(1.) In issuing a license to retail spirituous liquors, a judge of probate acts judicially, and not ministerially; as in the analogous cases where he approves a sheriff's official bond, or where a clerk issues an attachment.—*Ex parte Harris*, 52 Ala. 90; *Ex parte Gist*, 26 Ala. 161; *Matthews, Finley & Co. v. Sands & Co.*, 29 Ala. 137; 11 Johns. 158; *People v. Jones*, 54 Barb. 311.

(2.) That the license can not be collaterally impeached, on account of irregularities preceding its issue, see *Hawley v. The State*, 40 Ala. 689; *Scott v. Strobach*, 49 Ala. 487; 1 Brick. Digest, 157, §§ 30, 31; 18 B. Monroe, 33; 3 Pick. 300.

T. N. McCLELLAN, Attorney-General, for the State, cited *Grider v. Tally*, at the present term; *State v. Moore*, 1 Jones, N. C. 276; *House v. State*, 41 Miss. 737; *Ex parte Cox*, 19

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Ark. 688 ; *Mayor v. Boardman*, 39 Miss. 671 ; Bish. St. Crimes, 1001 ; *State v. Kennedy*, 1 Ala. 31.

CLOPTON, J.—The special act of February 28th, 1881 (Acts 1880–81, p. 192), makes it unlawful for any person, after January 1st, 1882, to manufacture, sell, or give away, vinous, spirituous, or malt liquors, bitters or beverages, composed, in whole or in part, of such spirituous or malt liquors, or intoxicating drinks, in Bullock county, with certain exceptions not necessary to be noticed. The third section provides for an election in any incorporated city or town having a population of two hundred and fifty, or more. Whether such election was held in James, an incorporated town, where the selling is shown to have occurred, and the result of the election, are not shown by the record. We shall assume, for the purposes of this opinion, that an election was held as provided by the statute, and that the result was in favor of "license." In such event, the prohibitory provisions do not apply to such incorporated city or town, and the general laws, governing and regulating the issue of licenses, are in force so far as applicable. By the statute then in force, no license must be granted to sell vinous or spirituous liquors in any incorporated city or town, unless the applicant produce to the judge of probate the recommendation of twenty respectable freeholders and householders, residents within the corporate limits, if so many, and if not, a majority will be sufficient ; and a particular affidavit is prescribed, necessary to be taken and subscribed before license can be granted.—Acts 1882–3, pp. 36, 37.

The authority of the judge of probate to issue license is conferred by statute ; and in *Grider v. Tally*, at the present term, we held, after full consideration, that he acted in a ministerial capacity in the matter of issuing licenses to retail vinous or spirituous liquors under the general laws. The extent of the authority of the judge, and the conditions preliminary to its exercise, are prescribed and regulated by statute. A ministerial act is one performed by an officer or person in obedience to a legal mandate, or by legal authority, and involves the following of instructions. The officer or person can not alter, add to, or dispense with any of the conditions, on which the authority is dependent. The performance of the act is not conclusive of authority, and it is permissible to go behind the act, and show that the pre-requisites to performance did not exist. The statutes are inhibitory ; no license shall be granted, unless the applicant complies with the statutory requirements. Authority is conferred, and its exercise commanded, on specified acts being done by the applicant ; and denied, if not done. To the validity of a ministerial act, authority conferred on the

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officer, expressly or by necessary implication, is essential. The power of the judge of probate being purely statutory, a license issued by him, without the applicant having first complied with the statutory requirements, is void. Where the act is judicial in its nature, the jurisdiction being limited and statutory, the jurisdictional facts should appear; and when ministerial, evidence is admissible to show the want of authority. *State v. Moore*, 1 Jones L. 276; *House v. State*, 41 Miss. 737; *Vose v. Drake*, 7 Mass. 280; *Smith v. Low*, 5 Ired. L. 197.

The license is *prima facie* evidence of compliance, and it is incumbent on the prosecution to show that the pre-requisites to its issue have not been observed. It being a question of power, neither knowledge of non-compliance, nor any act of the judge of probate, can excuse the applicant. He is presumed to know the statutory requirements, and a failure on his part is at his peril. Waiving consideration of the sufficiency of the recommendation, it is manifest that the affidavit omits the following material and substantial provisions; that the applicant will not knowingly sell or give away vinous or spirituous liquors to any person of known intemperate habits, and will not keep open on Sunday for the purpose of carrying on the business. The issue of the license was in violation of law, and void.

What we have said as to the capacity in which the judge of probate acts, has no reference to the act of February 17th, 1885, amendatory of section 1544 of the Code, from the provisions of which Bullock county is excluded.

Affirmed.

NOTE BY REPORTER.—The case of *Carmichael v. The State*, from the same court, and involving the same questions, was affirmed on the authority of the above opinion.

Ex parte Rhear.

Application for Mandamus in matter of Habeas Corpus.

1. *Application for bail or discharge on habeas corpus; burden of proof.* On an application for a discharge or bail by a person who is in confinement under an indictment for murder, he is presumed to be guilty of murder in the first degree, unless that presumption is overcome by the evidence adduced; and the indictment being produced, the defendant must take the initiative, and rebut the presumption arising therefrom.

The petitioner in this case, Orlando M. Rhear, being con-
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fined in the jail of Colbert county, under an indictment which charged him with the murder of James Sisk, presented his petition for the writ of *habeas corpus* to Hon. H. C. SPEAKE, the presiding judge of the circuit, alleging that he was not guilty of the offense, and asking that he be discharged, or admitted to bail, as might seem right and proper on the facts developed at the hearing. On the hearing under the writ, as appears from a bill of exceptions reserved by the petitioner, "the petitioner being present in court, and the State by its counsel, both parties announced themselves ready; some twelve witnesses were called on behalf of the State, sworn, and put under the rule, and about eight witnesses were called on behalf of the defendant, sworn, and put under the rule. The State then introduced the indictment, and rested, declining to introduce any evidence to show upon what state of facts said indictment was founded; against which action the defendant objected and protested, but the judge sustained the action of the State, and ruled that the indictment was all the evidence the State was required to produce on the hearing, unless in rebuttal; to which action and ruling the defendant excepted. The defendant then asked and moved that the State be required to introduce evidence to show on what state of facts said indictment was found; which motion the court overruled, and the defendant excepted. The defendant then moved that the State be required to show whether the indictment was founded on a state of facts constituting murder in the first or second degree; which motion the court overruled, and the defendant excepted. The defendant then moved that, as the witnesses were all present, sworn, and put under the rule, and the State declined to examine any witness on the hearing, and the indictment did not show whether it was for murder in the first or second degree, the defendant be admitted to bail; which motion was overruled by the presiding judge, who refused to admit the defendant to bail, unless he would take the initiative, and show by evidence that the offense was less than murder in the first degree, to which ruling and refusal the defendant excepted. The defendant then urged upon the judge, that it was impossible for him to know how to defend himself on the hearing, or to learn the facts on which the indictment was founded, without introducing the State's witnesses, thereby making them his own, and putting it out of his power afterwards to assail or discredit them, and, for this reason, the State should be required to first produce and examine its witnesses; but the judge overruled said motion *in toto*, and the defendant excepted."

On these facts, the petitioner renews his application to this court, making the bill of exceptions an exhibit to his petition, and praying the court "to award a writ of *mandamus*, or other

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appropriate writ, directed to the judge of said eighth judicial circuit, commanding and directing him to hear the evidence against the petitioner, as well as that in his behalf, and to determine from the evidence whether he is or is not entitled to bail; and he further prays for any other remedial writ or process, in accordance with the facts in his case."

J. B. MOORE, for the petitioner.

T. N. McCLELLAN, Attorney-General, for the State.

STONE, C. J.—In *Ex parte Vaughan*, 44 Ala. 417, this court said: "On an application for bail by a prisoner, who is shown to be under indictment for murder, he is presumed to be guilty of the charge in the highest degree, and that presumption must be overcome by proof." In the recent work, Church on *Habeas Corpus*, § 404, it is said: "The applicant must show that, though held to answer a charge of a capital offense, the proof is not evident. In this, the prisoner must take the initiative. . . . The question [whether he is guilty of murder in the first degree, and therefore not bailable] should be determined without reference to whether the evidence was introduced by the applicant, or by the State, and without reference to the *prima facie* case, which would, in the absence of proof, be made by the production of a *capias* and a valid indictment."—See, also, *Ex parte Glaron*, 75 Ala.

There is no error in the rulings of the Circuit Court, and neither *mandamus* nor appellate *habeas corpus* will be awarded.

King v. The State.

Indictment for Assault and Battery.

1. *Proof of transfer of cause from County to Circuit Court; general objection to evidence partly admissible.*—Where a witness testifies that the prosecution, commenced in the County Court, was there continued several times, and that the prosecution was then transferred to the Circuit Court, a general objection to his evidence is properly overruled, although the docket would be the best evidence of the several continuances.

2. *Charges asked and refused, but not shown to be in writing.*—The refusal of charges asked, which are not shown to have been asked in writing, is not available on error.

FROM the Circuit Court of Cullman.

Tried before the Hon. LEROY F. BOX.

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[McKleroy v. The State.]

No counsel appeared for the appellant in this case, so far as the record and the dockets show.

T. N. McCLELLAN, Attorney-General, for the State.

SOMERVILLE, J.—The statement of the witness Johnson, to which objection is taken, is to the effect that, while the prosecution was pending in the County Court, the cause was *continued* several times, *and* that the prosecution and papers therein were transferred to the Circuit Court. The objection urged is, that there was better evidence of these facts, than the oral statement of the witness. Admitting that the docket of the County Court was the best evidence of the several continuances, this objection did not apply to the last portion of the witness' statement, and it was, for this reason, properly overruled.

The three charges requested by the defendant, and refused by the court, are not shown to have been in writing; and, for this reason, their refusal was without error. No exception, moreover, was reserved to the rulings of the court on these charges, and the record therefore presents no question on them which we can consider.

The judgment must be affirmed.

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Indictment for Arson.

1. *Charges as to measure of proof.*—In criminal cases, while absolute or mathematical certainty is not required, to authorize a conviction, the evidence must produce a conviction of the truth of the charge with that degree of certainty on which the mind reposes with satisfaction; and while "reasonable doubt," and "moral certainty," as used in this connection, are correct expressions, "it is possible," or "it may be," or "perhaps" the defendant is not guilty, as used in charges requested, imply only a possible or imaginary doubt, and the charges are properly refused.

2. *Charge objectionable for generality, or calculated to mislead jury.*—When a charge asserts a correct legal proposition, but is calculated to mislead the jury, or is objectionable for generality, neither the giving nor the refusal of it is an error which will work a reversal, since the party supposing himself injured by it may protect himself by asking an explanatory or more specific charge.

FROM the Circuit Court of Barbour.

Tried before the Hon. H. D. CLAYTON.

The defendant in this case was indicted for arson, and pleaded not guilty, but was convicted, and sentenced to the penitentiary

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for the term of ten years. On the trial, he reserved a bill of exceptions, which does not set out any of the evidence adduced, but states that, after the court had charged the jury without objection, the defendant requested the following charges in writing: (1.) "Before the accused can be convicted, every ingredient of the crime with which he stands charged must be proved, and proved beyond all reasonable doubt, and the jury can not supply any missing link by mere inference or supposition." (2.) "Unless the evidence against the defendant is such that it excludes to a moral certainty every hypothesis but that of his guilt of the offense with which he is charged, the jury must find him not guilty." (3.) "Every one, charged with the commission of an offense against the law, is presumed innocent until his guilt is established; and the evidence, to induce conviction, should not be a mere preponderance of probabilities, but should be so convincing as to lead the mind to the conclusion that the accused can not be guiltless. Moral certainty, excluding all reasonable doubts, is the measure of proof in criminal cases." The court gave these charges as asked, but afterwards gave, on the request of the solicitor, the following charges "in rebuttal:" (1.) "When the law says that, before they can convict, they must believe to a moral certainty that the defendant is guilty, this simply means that they must believe his guilt beyond all reasonable doubt." (2.) "When the law says 'to the exclusion of every other reasonable hypothesis,' this is only another expression meaning that they must believe he is guilty beyond a reasonable doubt; and if the jury, from all the evidence in the case, and the proper conclusions to be drawn from the evidence, believe beyond a reasonable doubt that the defendant is guilty, and that the offense was committed in this county, and within the time covered by the indictment, they must find him guilty." (3.) "To prove beyond a reasonable doubt that the defendant is guilty, does not mean that the State must make the proof by an eye-witness, or to a positive, absolute, mathematical certainty. This latter measure of proof is not required in any case. If, from all the evidence, the jury believe that it is possible, or that it may be, or perhaps the defendant is not guilty, this degree of uncertainty does not amount to a reasonable doubt, and does not entitle the defendant to an acquittal. All that is required is, that the jury should, from all the evidence, believe beyond a reasonable doubt that the defendant is guilty; and if they so believe, and it was in this county, and before the finding of this indictment, they must find the defendant guilty, although they may also believe, from the evidence, that it may be he is not guilty, or that it is possible he is not guilty." To the giving of each of these additional charges the defendant duly excepted.

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JNO. D. ROQUEMORE, for the appellant.—The charges given by the court at the instance of the defendant, asserted correct legal propositions, in plain and unambiguous terms; and the giving of the additional charges, “in rebuttal,” it is called, could only tend to confuse the jury, or make them suppose that these charges in some way limited or qualified the former charges.—*Coleman v. The State*, 59 Ala. 52; *Clifton v. The State*, 73 Ala. 473; *Solomon v. The State*, 28 Ala. 83; *Tompkins v. The State*, 32 Ala. 569; *Miller v. Garrett*, 35 Ala. 96; *Tillman v. Chadwick*, 37 Ala. 317; *Brewer v. Watson*, 61 Ala. 299.

T. N. McCLELLAN, Attorney-General, for the State.

CLOPTON, J.—The terms, “reasonable doubt,” and “moral certainty,” convey to the ordinary mind their sense and meaning with more accuracy and better understanding than definition or explanation can impart. Without attempting what others have found so difficult, it may be said in general words, the doubt must be actual and substantial, not merely possible or ideal. The certainty must be of the degree that produces a conviction of the truth of the charge, on which the mind reposes with satisfaction. Absolute or mathematical certainty is not required. What amount of evidence will be sufficient to this conviction, must be left to the conscience and judgment of the jury. The expressions, “it is possible,” or “it may be,” or “perhaps the defendant is not guilty,” imply only a possible, conjectural, or imaginary doubt. Conviction is not inhibited on the existence of such doubt merely. The rule is not intended to paralyze the administration of the criminal law.

2. The court, at the instance of the defendant, gave three different charges, to the effect, respectively, that every ingredient of the crime must be proved beyond a reasonable doubt; that the evidence must exclude to a moral certainty every hypothesis but that of guilt; and that conviction should not be had on a mere preponderance of probabilities, but the evidence must be so convincing as to lead the mind to the conclusion that the accused can not be guiltless. The different phrases, “beyond a reasonable doubt,” and “moral certainty,” and “so convincing as to lead to the conclusion that the defendant can not be guiltless,” are equivalent and convertible expressions of the same rule.—*Com. v. Worthy*, 118 Mass. 1. By the explanatory instructions, given in separate charges at the request of the prosecution, the court so instructed the jury; which was proper, in order to prevent misleading or confusing the jury, by an erroneous impression, that each charge expressed a different rule as to the amount of evidence requisite to conviction.

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In *Coleman v. The State*, 59 Ala. 52, speaking of charges similar to the last two asked by defendant, it is said: "These two statements of one and the same principle have stood as guides, and without material impairment, for many years. We have no intention now to question them. They are but strong expressions of that full measure of proof which the law exacts, before it will sanction a conviction of a criminal offense. But, given nakedly, and without explanation, we fear they may, and sometimes do, produce an erroneous impression on the minds of the jury." If it were supposed the charges were calculated to mislead the jury by their generality, qualifying charges should have been asked. Neither giving nor refusing an instruction, which asserts a correct legal proposition, when too general, or calculated to mislead the jury, will work a reversal. If such charge is given, the party objecting should ask a more specific charge; if refused, no injury results.—1 Brick. Dig. 336, § 10; 339, §§ 60, 61.

Affirmed.

Jones v. The State.

Indictment for Murder.

1. *Change of venue; refusal of, how revisable.*—To enable this court to revise the refusal of an application for a change of venue in a criminal case (Sess. Acts 1884-5, p. 140), the point must be duly reserved by bill of exceptions, and a recital of an exception in the judgment-entry only is not sufficient.

FROM the Circuit Court of Russell.

Tried before the Hon. H. D. CLAYTON.

The defendant in this case, Thomas D. Jones, was indicted for the murder of Ivey Doles, and, on his first trial, was convicted of murder in the second degree, and sentenced to the penitentiary for the term of eighteen years; but the judgment was reversed by this court, at his instance, and the cause remanded.—*Jones v. The State*, 76 Ala. 8. After the reversal and remandment, as the judgment-entry in the present record shows, "the defendant moved the court for a change of venue; which motion, being duly considered by the court, is overruled and refused, and the defendant excepts." The judgment-entry then recites the defendant's arraignment and trial, the verdict of the jury, and the sentence and judgment of the court; after which these words are added: "And the defendant having

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reserved questions of law for the determination of the Supreme Court, it is ordered that this judgment and sentence be suspended until this case is determined by the Supreme Court."

W. F. FOSTER, for the appellant.

T. N. McCLELLAN, Attorney-General, for the State.

STONE, C. J.—By the act approved February 17th, 1855 (Sess. Acts, 140), it was provided, "that the refusal of the primary court to order a change of venue in any criminal case shall no longer vest [rest?] in the irrevocable discretion of the court to which application for the change of venue is made, but, after final judgment, may be reviewed and revised in the Supreme Court, in the same manner, and to the same extent, as other questions of law arising in criminal cases." This is the first case which has come before us on this statute, and we have to regret that the question is not so raised as that we can consider it. It will be noted, that the statutory provision is, that such ruling "may be reviewed and revised in the Supreme Court, in the same manner, and to the same extent, as other questions of law arising in criminal cases." Section 4978 of the Code of 1876 declares in what manner questions of law may be reserved by defendants in criminal cases. It must be "by bill of exceptions, duly taken and signed by the presiding judge." In *Ex parte Knight*, 61 Ala. 482, this section of the Code was construed. In that case, as in this, the judgment-entry recited the ruling of the court which was attempted to have reviewed, and that the defendant excepted to the ruling. In that case, as in this, there was no bill of exceptions signed by the presiding judge. This court said: "The reservation must be made at the time of the decision of the question—it is the act of the defendant, of which the court must be notified, that it may be introduced on the record, and justify the subsequent order suspending the execution of the judgment. Giving to the recital of the record—'the defendant excepted to the decision of the court'—its largest significance, and it could indicate no more than that he had a present intention of reserving the decision for the consideration of this court, and would carry the intention into effect thereafter, by a bill of exceptions." The question in that cause not appearing in the record proper, we hold it was not reserved, and could only have been reserved by bill of exceptions.

In the present record there is no bill of exceptions. The clerk has copied in the transcript several affidavits, which purport to have been subscribed and sworn to. Such affidavits are mere testimony for a single purpose, and are no part of the

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record. They are not even indorsed filed; but, if they had been, that would have been insufficient. There is in this record no question reserved which authorized its transmission to this court for review, and the appeal must be dismissed.

We deem it not improper to add, that if the affidavits found in this transcript comprise the entire testimony before the Circuit Court, on which the motion for change of venue was allowed, we are not prepared to say we find in them enough to justify a reversal of that court's judgment.—*Edwards v. The State*, 49 Ala. 334; *Nooe v. Garner*, 70 Ala. 443.

Appeal dismissed.

CLOPTON, J., not sitting,

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Action on Official Bond of Defaulting Tax-Collector.

1. *Official bond of county officers; non-residence of sureties.*—Although the statute declares that the official bonds of tax-collectors (and other officers therein specified) “shall be invalid and insufficient in law, unless the sureties upon such bonds respectively reside in the county in which the duties of such officers are to be performed” (Code, § 164); yet the bond is not void because of the non-residence of one or more of the sureties, nor can the sureties set up the fact of such non-residence in defense of an action on the bond.

APPEAL from the Circuit Court of Clarke.

Tried before the Hon. WM. E. CLARKE.

This action was brought in the name of the State of Alabama, against R. H. Flinn and others, his sureties on his official bond as tax-collector of said county; and was commenced on the fifth November, 1883. The bond was dated November 16th, 1882, and was conditioned for the faithful discharge by said Flinn of his duties as tax-collector during his term of office. The complaint alleged, as breaches of the bond, the failure of said Flinn to pay over, according to law, moneys collected as taxes during the years 1882 and 1883. A special plea was filed by John W. Wilson and R. W. Atkinson jointly, two of the sureties, alleging that said R. W. Atkinson was, at the time of the execution of said bond, a non-resident of said county of Clarke, and said bond was therefore invalid and insufficient in law, and no recovery could be had upon it; and a similar plea was filed by said Flinn and the other sureties jointly. A demurrer was

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interposed to each of these pleas, but was overruled by the court ; and the judgment on the demurrer is now assigned as error.

T. N. McCLELLAN, Attorney-General, H. PILLANS, and W. D. DUNN, for the appellant.

S. J. CUMMING, and JNO. Y. KILPATRICK, *contra*.

SOMERVILLE, J.—Section 164 of the present Code provides, that the bonds of tax-collectors, and many other officers specified, “shall be *invalid and insufficient* in law, unless the sureties upon such bonds respectfully *reside in the county* in which the duties of such officers are to be performed.”

The only question presented by the present appeal is, whether the non-residence in a county of one of the several sureties so far vitiates the bond as to destroy its binding force upon the obligors setting up such defense. One of the sureties on the tax-collector's bond, here sued on, is shown to reside out of the county of Clarke—the county in which the duties of this officer were to be performed—his place of residence being in an adjoining county ; and this fact is averred by special plea. The Circuit Court, on demurrer, held the plea to be a good defense to the action on the bond.

We entertain no doubt as to the incorrectness of this ruling. The purpose of the act approved March 17th, 1875, which is embodied in sections 164 to 168, inclusive, of the Code, is manifest. It was designed to destroy the evil of straw-bonds, which had for many years previous prevailed in this State, during which one person, often himself a bonded officer of the Federal Government, or of the State, or of a county or municipality, was surety on a score of bonds of as many different officials, many of whom frequently interchanged the favor of mutual suretyship. These bonds were insufficient, by reason of the multiplied contingent liabilities of the obligors ; and the non-residence of the parties was a stumbling block to a diligent inquiry by the approving officer as to their sufficiency.—*Ex parte Buckley*, 53 Ala. 42. The title of the act is declared to be, “To secure good and sufficient sureties upon the bonds of the county officers of this State.”—Acts 1874–75, p. 50. We must construe the act with reference to the mischief and defect against which the previous law did not provide, and the nature of the remedy appointed to correct them ; so, in other words, as to meet the mischief, and to advance the remedy, and, in doing so, not to violate fundamental principles.—Potter's Dwaris Stat. & Const. 184. To this end, being a remedial statute, it must be largely as beneficially construed.—*Steele v. Tutwiler*, 68 Ala. 107 ; *Ex parte Buckley*, *supra*.

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We are satisfied that the legislative intent was never, in view of the foregoing considerations, to declare a bond of no binding efficacy on the obligors because of their insufficiency as sureties under the requirements of the statute. The language of the statute is, that the bond "shall be *invalid and insufficient*," but this does not mean for all and every purpose. It means simply for the purposes of the act. The word "invalid" is narrowed in meaning by the context and the policy of the statute, the sixth section of which, now comprising section 192 of the Code, authorizes the chancellor of the division, or circuit judge of the circuit, on application to them, by five or more resident freeholders of the county, properly verified by affidavit, to pronounce any bond of the officers designated to be "invalid or insufficient" for want of conformity to the requirements of the act, and thereupon to require the execution of a new bond with sufficient sureties.—Code, 1876. § 192; Acts 1874–75, p. 51, sec. 6. It has never been supposed that the want of the requisite statutory qualifications on the part of a surety upon an official, or other bond, exempted either himself or his co-obligors from all liability upon such bond. Such surety is estopped, upon every principle of fair dealing and good conscience, from asserting his own disqualification as a defense to such liability, because the signing of the bond was an admission to the contrary, and he can not afterwards work an injustice by seeking to gainsay it. The policy of the law would be defeated by adopting a construction which would admit of a result so inequitable, and we would be confronted by the absurdity that all bonds of the class under discussion would be void for all purposes, and of no binding force on the obligors, if any one of them, by concealment, misrepresentation or artifice, could procure himself to be accepted as an approved surety, when, in truth and fact, he was insufficient under the provisions of this statute, because of his non-residence in the county, or other unknown disqualification. To state such a proposition is to refute it.

The ruling of the Circuit Court was erroneous, and the judgment is reversed and the cause remanded.

Amy & Co. v. Selma.**Amy & Co. v. Gill et al.**

Action on Judgment, against Successor of Dissolved Municipal Corporation; and Bill in Equity by Statutory Commissioners, against Creditors of Dissolved Municipal Corporation, for Administration of Assets and Settlement of Trust.

1. *Dissolution of municipal corporation; effect on existing debts and liabilities.*—The act of the General Assembly approved December 11th, 1882, entitled "An act to vacate and annul the charter, and to dissolve the corporation of the city of Selma, and to provide for the application of the assets to the payment of the debts thereof" (Sess. Acts 1882-3, pp. 221-32), operated a dissolution of said municipal corporation, and withdrew from it all governmental power, except so far as the continued exercise of such power was thereby specially authorized; but, as to the debts and liabilities then existing against said corporation, said act was without any legal operation whatever, their obligation being neither extinguished nor lessened thereby.

2. *Same; appointment of trustees for administration of assets, with power to file bill in equity*—Said act is not objectionable, in authorizing the appointment of commissioners by the governor, and conferring on them power to take charge of and collect the assets of the dissolved corporation, and apply them as by law required; nor in authorizing said commissioners to file a bill in equity in the City Court of Selma, for the instructions and protection of said court in the performance and discharge of their duties; nor in conferring jurisdiction of the case on that court, nor in the mode of procedure prescribed.

3. *Same; effect of act in taking governmental power from people.*—Said act does not contemplate a deprivation, permanent or temporary, of the people residing within the territorial limits of said corporation, of the power of local government as they had been accustomed to exercise it, nor a suspension or cessation of such government for any appreciable period of time; but, on the contrary, plainly contemplates the creation of another municipal corporation, to which substantially the same people and the same territory would be subject.

4. *Same; subsequent act creating new corporation as successor.*—The subsequent act approved February 17th, 1883, entitled "An act to incorporate the inhabitants and territory formerly embraced within the corporate limits of the municipal corporation (since dissolved) styled the City of Selma, and to establish a local government therefor" (Sess. Acts 1882-3, pp. 396-432), is an execution of the intent manifested by said prior act, and a re-organization of the same corporators and substantially the same territory; and said new corporation, as the successor of the old, is bound to the payment of its debts, and the satisfaction of its liabilities.

5. *Same; parties to bill.*—The new corporation being bound to pay the debts and liabilities of its predecessor, it is a necessary party to a

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bill filed by the statutory commissioners under the provisions of said prior act under which they were appointed.

6. *Same ; action against new corporation, on judgment against predecessor.*—An action at law may be maintained against said new corporation, as the successor of the former, on a judgment recovered against the former before dissolution.

APPEALS from the City Court of Selma, at law and in equity. Tried and heard before the Hon. JONA. HARALSON.

These two cases, which were argued and submitted together, involve a consideration of the constitutionality, construction and effect of the following acts of the General Assembly :

(1.) “ *An act to vacate and annul the charter, and dissolve the corporation of the City of Selma, and to provide for the application of the assets thereof to the payment of the debts thereof.*” Approved Dec. 11th, 1882.

SECTION 1. “ *Be it enacted*” &c., “ That the act of the General Assembly of Alabama, entitled ‘ *An Act to establish a new charter for the City of Selma,*’ approved March 8th 1875, and all acts of a date subsequent thereto, amendatory thereof, and all other acts incorporating the *City of Selma*, under that or any other corporate name, and the act entitled ‘ *An Act to authorize and empower the mayor and council of the City of Selma to establish and provide a sinking fund for the payment of the principal and interest of the bonded debt of said city,*’ approved February 23, 1872, and all other acts in conflict or inconsistent with the provisions of this act, be, and the same are hereby repealed ; and that the corporation of the City of Selma, incorporated, known and styled, as the *City of Selma*, be, and the same is hereby dissolved ; and all offices held under or by virtue of any of said acts, except for the purposes, and during the period hereinafter prescribed, are hereby abolished ; and all power of taxation, in anywise vested in, or exercised by said corporation or its officers, under or by virtue of said acts, or any of them, or otherwise, is forever withdrawn, and is hereby resumed by, and lodged in the legislature of this State ; and all the public buildings, squares, wharves, streets, alleys, cemeteries, parks, fire-engines, hose, carriages, horses, mules, and carts, and all other property, real and personal, hitherto held and used by said corporation, for governmental or other public purposes, and all trust property, and the proceeds of all trust property, held by said corporation upon any trust, are hereby transferred to the custody and control of the State of Alabama ; to remain public and trust property, respectively as heretofore, for the uses, and upon the trusts, to which the same has hitherto been held and applied ; and the inhabitants and territory within the territorial limits and jurisdiction

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of said corporation, as hitherto defined, are hereby resolved into the body of the State.

SEC. 2: "That the Governor of this State shall appoint three persons, citizens of the county of Dallas, who shall be known and called the commissioners of the city of Selma, and who shall hold their office for the term of two years, and until their successors are qualified, unless, before the expiration of said term, the duties and business of their office shall have been fully discharged and performed, or unless, before the expiration of their said term of office, their said office be vacated or otherwise discharged by act of the General Assembly of this State. Before entering upon their said office, said commissioners shall each file with the Secretary of State an oath, by them respectively taken and subscribed before the judge of the City Court of Selma (and which shall be entered on the minutes of said court, at rules, or in term time), as prescribed in article fifteen of the constitution of this State, and shall also enter into bond, conditioned for the faithful discharge of the duties of said office, and payable to the State of Alabama, in such an amount, and with such sureties as the judge of said court may prescribe and approve. Should any vacancy occur in said office, the remaining members or member shall certify such vacancies or vacancy to the judge of said court, together with the name or names of a suitable person or persons to fill such vacancy; and if the judge of said court approve such nomination, such person or persons shall be appointed and commissioned by the Governor, and shall qualify for, hold, and execute his or their office in all respects as if originally appointed, as herein first provided. The non-acceptance by any person of his appointment under this act, shall be held and taken to be a vacancy within the meaning of this act. If vacancies occur, and be not certified to the judge of said court, as herein provided, within the period of ten days next after their occurrence, it shall be the duty of the judge of said court, on information of the fact, verified by affidavit of two or more credible citizens, to fill such vacancy by proper appointment; and persons so appointed by the judge of said court, shall qualify for and hold and execute their office, in all respects as if originally appointed, as herein first provided.

SEC. 3: "That said commissioners shall, upon their appointment and qualification, at once enter upon and take possession of all the property, real and personal, which, prior to the passage of this act, in any way belonged to the said city of Selma, and shall also have, demand, receive and collect all the *choses* in action, debts, claims and demands of all kinds, and of every name and nature, including all sums of money for taxes and licenses before the passage of this act lawfully assessed, levied

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or laid by or on behalf of the said city of Selma, and which said corporation was, on said last mentioned day, entitled to have, demand, receive or collect, from any person or persons, company or companies, corporation or corporations, property, properties, business or employment or occupation whatsoever, and which were then not paid or otherwise lawfully discharged; and they shall realize and collect all said debts, claims and demands, at as early a date as practicable, and apply the same, and the proceeds thereof, to and for the uses, purposes and objects in this act declared; but nothing in this act contained shall be construed to vest in said commissioners any power or authority to lay or levy any tax or assessment whatever upon any property, polls, business or occupation, or to demand, receive or collect any money, or other thing, from any person, or from any corporation, or from or out of any property or business, except such sum or sums of money as had been lawfully levied, assessed, or laid by or on behalf of the said city of Selma, or had accrued to the same before the date of the passage of this act, and not then paid to said corporation, or collected or otherwise discharged by the authority thereof.

SEC. 4: "That said commissioners shall forthwith prepare, or cause to be prepared, a list and full description of all the debts and liabilities of all kinds which exist against said city of Selma, the nature and consideration of the same, the date thereof, when contracted, and the form and time of maturity thereof, with such information in relation thereto as will fully describe and identify all the debts of said corporation, existing at the date of the passage of this act. They shall also forthwith prepare, or cause to be prepared, full lists and inventories of all the property, rights of property, claims and demands of every kind, including unpaid back taxes due or belonging to said corporation, which may come to their possession or knowledge, so far as to furnish detailed information of all the assets applicable to the payment of the debts of said corporation, and also with said lists and inventories, prepare a statement and description of all the liens, rights and trusts, which may exist or be alleged against or upon said property and assets, or any portion thereof; and it shall be their duty, from time to time, as fuller information may be obtained, to prepare supplemental and amended lists, inventories and statements of the matters and things in this section specified.

SEC. 5: "That it shall be the duty of said commissioners, immediately upon their qualification hereunder, and thereafter, from time to time, as occasion may require, to give notice of their appointment and the purpose thereof, to all persons in possession of any part or portion of the property or assets, with the administration of which they are hereby charged, or

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who may be in possession of the books, papers or other evidences of the right or title of said corporation thereto; and thereupon said persons, including the commissioners of the sinking fund aforesaid, shall surrender and deliver all such property and assets, books, papers and evidences, to said commissioners, for the purposes herein declared, or thenceforth hold the same subject to the order of said commissioners. Said commissioners shall give public notice of their appointment and the purpose thereof, and of this act, by publication in such newspapers published in this State or elsewhere, or otherwise, as in their judgment is most likely to bring knowledge of the object of their appointment and of this act to creditors of said corporation and other persons interested.

SEC. 6: "That it shall be the duty of said commissioners forthwith, upon their qualification, or as soon thereafter as practicable, by bill or other proper proceeding in chancery, and in manner conformable to the practice in Courts of Chancery, to apply to the said City Court of Selma, upon the equity side thereof, for instruction, direction and protection, in the performance and discharge of their duties as trustees, by this act imposed; and they shall thereupon and thenceforth become and be officers of said court, and receivers of the property and assets hereinbefore described, and charged with the duties and obligations of receivers in chancery; and be in all respects subject to the orders of said court as receivers, and as such shall be entitled to the aid and protection of said court; and from time to time, by petition or other proper application, as they may be advised, may apply to said court for such advice and direction in the discharge of their duties as the nature of the case may require. The lists, inventories and statements hereinbefore required to be prepared by said commissioners shall by them be presented to, and filed in said court; and they shall, at the beginning of each term of said court, and oftener if required, make due report of their acts and doings in the premises, in manner as receivers in Chancery Courts are required to do. Said court may, for good cause, remove said commissioners from office, and by appointment fill the vacancies thereby occasioned; and generally may, from time to time, require of them reports, statements, explanations and accounts, as from other receivers and managers of property and estates, appointed by the court.

SEC. 7: "That it shall be the duty of said City Court of Selma, in the exercise of its equity jurisdiction, to take jurisdiction of the administration and application of the assets of said dissolved corporation, in discharge of the debts of said corporation, herein provided for, as trust property; and to proceed therein and administer said assets as a trust estate, for the

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benefit of the parties thereto entitled, according to the rules and practice of Courts of Chancery; and to take such steps and make such orders as may be necessary to bring before said court all parties and persons interested in the subject-matter of such proceedings, and to make them amenable to the jurisdiction of the court; and therein generally to do, act, adjudge and decree as law, equity and justice may require.

SEC. 8: "That said commissioners and receivers shall take, hold and possess all the property, real and personal, and all the rights, claims, demands and assets of the said city of Selma, of which they come into possession as such commissioners and receivers, upon the same trusts, and subject to the same liens, charges and duties, that the same were under in possession of said corporation; and said commissioners and receivers shall, under the supervision of said court, manage and administer, or rent or let, such of said property, which may come into their possession, as may be capable of yielding income, and shall take care of and preserve such of it as is not capable of yielding income; and shall make such arrangements as may be necessary and proper, in order that the public and trust property held, used or possessed by said corporation, may continue to be used with due regard to the public health, safety and convenience, and with due regard to the terms of the trust upon which any trust property may be held; and all surplus funds received by them from the management or use of said property, after payment of the expenses and charges incurred in or about the same, shall be reported to said court, and held and applied, under the direction thereof, to the debts of said corporation, or to the other purposes to which said funds may be properly applicable. But nothing in this act contained shall be construed to make liable to the payment of said debts any property, right of property, or income, which would not be so liable, if this act had not been passed.

SEC 9: "That it shall be the duty of said commissioners and receivers, to realize as speedily as possible, under the direction of said court, all the available assets of said corporation, which may come into their hands under the provisions of this act; and to this end, they are, subject to the approval of said court, hereby authorized to compromise, compound and adjust all debts, claims and demands, including past-due taxes of every kind, which, at the date of the passage of this act, existed in favor of said corporation, on such terms, and in such manner, as, having in view the speedy collection of the assets of said corporation, and the application thereof to the payment of its debts, may be deemed best; and, to this end, they are further authorized and empowered to sell any or all of the real and personal property, claims and demands which may come to

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their hands, as such commissioners, under the provisions of this act, and which is not by existing laws exempt from sale and from the payment of debts, on such terms and conditions, and under such proper safeguards, as said court shall prescribe.

SEC. 10: "That for all the objects and purposes contemplated by this act, the said City Court of Selma shall be held and deemed to be always open, and the presiding judge thereof, sitting as chancellor, in the exercise of the equity jurisdiction of said court, may sit, and make and render the proper orders and decrees for the administration of said trust, and for the guidance and direction of said commissioners and receivers, the same in vacation as in term time, upon notice in accordance with the rules of practice in Chancery Courts; and should any case arise in the premises, not provided for by the ordinary rules of practice, in which it is necessary to give notice to parties in interest and bring them before the court, the judge of said court, sitting as a chancellor, may prescribe the time, terms, and manner of giving such notice.

SEC. 11: "That all moneys received and collected by said commissioners, shall be deposited by them in some bank or banks in the county of Dallas, to the joint credit of said commissioners as receivers of said court, and shall be paid out only on the check or draft of the commissioners, countersigned by the clerk and register of said court, upon the order of said court made in the premises; but a sufficient sum to meet the current expenses, to be specified by the judge of said court, in an order in that behalf, may be deposited or left in bank, subject to the order of said commissioners.

SEC. 12: "That said commissioners, immediately upon their qualification, shall take possession of all the books of account, ledgers, journals, cash books, deeds, contracts, books of assessment, and tax books of said corporation, and all books, papers and documents pertaining to the finances thereof, for the purposes of their office, and for the proper discharge of the duties by this act and by the order of said court imposed upon them. They may employ such clerks and assistants as the proper discharge of their duties may require, and at such compensation, to be paid out of collections made by them as such commissioners and receivers, as may be agreed upon, subject to the approval of said court. Such employees may, in the discretion of the said commissioners and receivers, under the instructions of said court, be required to give bond for the faithful performance of their duties, payable to the State of Alabama, in such amount, on such conditions, and with such sureties as said court may direct. Said court shall also fix and determine the amount of compensation to said commissioners and receivers for their services, and the same shall be paid out of collections to be

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by them made from the assets and property of the said trust estate.

SEC. 13. "That for the purpose of collecting said unpaid back taxes, said commissioners and receivers may retain for that service, at their discretion, the person who may, at the time of the passage of this act, hold the office of city tax-collector of said dissolved corporation, or may appoint some other suitable person to aid them in the performance of that duty ; but whoever may be appointed by them for that purpose, shall take the oath required to be taken by said commissioners, to be entered upon the minutes of said court, and must enter into bond with security, to be approved by the court, payable to the State of Alabama, in such amount and conditioned as said court may direct ; and thereupon the person so appointed shall proceed, under direction of said commissioners and receivers, to call in, collect, and enforce the collection of such back taxes as remained unpaid and not otherwise discharged at the date of the passage of this act, and which had heretofore, at any time, been lawfully assessed, levied, or laid by or on behalf of the said city of Selma ; and the machinery and remedies in said acts of incorporation provided for the collection and enforcement of taxes, are hereby retained and continued in full force and effect, for the purpose and to the extent of enabling said commissioners and receivers to collect and enforce the collection of said back taxes. Said collector shall make report to said commissioners of his said collections, as often and in such manner as required by them, and shall deposit the proceeds thereof in the bank or banks which may be designated as the depositories of said commissioners and receivers, as provided in section eleven of this act.

SEC. 14: "That said commissioners and receivers, at the end of every six months after their qualification, shall make special report to said court of the funds in their possession, and therein show the sources whence the same were derived and collected, and the liens and trusts, if any, existing thereon, and therein also show and exhibit what percentage can be paid on the several and respective classes of debts and liabilities of said corporation ; and thereupon said court may authorize and direct partial payments or dividends on account of said debts and liabilities out of said funds, having regard, however, to the order of payment and appropriation designated in the next succeeding section of this act.

SEC. 15: "That it shall be the duty of said commissioners and receivers, under the supervision and direction of the court, after the payment of the necessary expenses incurred in and about the execution of this trust, and after setting apart and making over to or for the use of the proper public department

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or governmental agency of said corporation, or other beneficiary of said fund, the proceeds of any tax or funds in their possession which were lawfully levied for, appropriated to the use of, or held in trust for, or otherwise belonging to such department, agency or beneficiary, to apply the funds by them realized and collected to the payment of the matured floating debt of said corporation in its character and capacity of governmental agency of the State, and to the payment of the other matured debt of said corporation; always, however, appropriating to the payment of said debts or liabilities the proceeds arising from property, taxes and income, which, before the passage of this act, were lawfully levied, appropriated or pledged to secure the same; *provided*, that funds arising from taxes, or income, levied or derived for governmental purposes, shall not be applied to the payment of the funded debt of said corporation, and funds arising from taxes or income levied or derived for the payment of said funded debt, shall not be applied to the payment of debts or liabilities incurred for governmental purposes.

SEC. 16: "That it shall be the duty of said commissioners, without delay, to open communication and conduct negotiations with the holders of the funded debt of said city of Selma, with a view to the settlement and adjustment thereof, and with a view to the enactment thereafter of proper legislation, to secure at the same time, and consistently with each other, the establishment of municipal government for the inhabitants and territory lately included in the said city of Selma, and the payment, to the utmost extent practicable, of the just debts of said corporation. And, to that end, they shall report the result of their negotiations to the Governor of the State, for the consideration of the General Assembly, at its next session, together with a draft of such bill, as, in their judgment, will best carry into effect any plan for the adjustment and settlement of said debts, which may have been agreed upon between the commissioners and said creditors, and secure the other objects herein declared. And upon the passage and enactment of such bill by the General Assembly, said commissioners shall apply to said court for such proper orders and decrees as may be necessary to secure the application of the assets, under its jurisdiction and control, to the uses and purposes which may be so agreed upon, and be declared by the act to carry such agreement into operation and effect; *provided*, that any *residuum* of funds, raised for governmental purposes, which may remain subject to the jurisdiction and control of the court, shall enure and be paid over to the authorities of any other municipal government, which may be established by law for the inhabitants and territory aforesaid, to be by such other municipal government used and applied for public governmental purposes.

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SEC. 17: "That this act shall go into effect from and after its passage ; except that the mayor and councilmen of said *City of Selma*, and the agents and officials thereof, shall remain in possession of, and be responsible for, all the books, papers, property and assets of said corporation, hereby dissolved, in their possession, or under their control, respectively, until the same be turned over and delivered to the commissioners appointed and qualified hereunder ; and except also that the said mayor and councilmen shall continue to have and exercise all the police powers, jurisdiction and authority, over the territory embraced within the corporate limits and police jurisdiction of said corporation, hereby dissolved, which were vested in them under the charter and amendments thereto, hereby repealed, until the first Monday in May, A. D. 1883, and until some form of government for the inhabitants and territory embraced in said limits shall have been established by law, and the officers and authorities therein provided for shall have been duly elected and qualified ; and until the time last aforesaid, the mayor of said city, or any councilman, acting as mayor, and the other officers, agents and employees thereof, shall have and exercise, over the territory aforesaid, all the police powers and jurisdiction conferred by said charter and amendments thereto, and the ordinances of said city now of force. And the said charter and amendments thereto, and the ordinances adopted thereunder, are hereby continued of force and effect, for the period aforesaid, for the purpose of enabling said mayor and councilmen, agents and officials, to exercise such police powers and jurisdiction. And, for and during the period aforesaid, said mayor and councilmen shall have power and authority, as heretofore, to impose and enforce fines and penalties for the violation of any of the provisions of said charter, by-laws and ordinances, and said fines and penalties, when enforceable in money, shall be collected by the marshal, and paid over to or for said commissioners, for uses and purposes in this act declared. But said mayor and councilmen, and other officials, shall have no power or authority to assess, levy or collect any taxes, or license fees, or revenues of any kind, whatever ; *provided*, however, that during the period aforesaid, in any and every case, where under the charter, by-laws and ordinances aforesaid, a license-tax or fee would have accrued and been payable to the *City of Selma*, from any person or corporation, for the carrying on of any business, or doing of any act, such license-tax or fee shall in the same manner accrue and be payable to said commissioners, to be enforced by them as other taxes and dues are enforceable by them ; and the said mayor and councilmen, in the exercise of their said police jurisdiction, shall, for and during the period aforesaid, have power and authority to im-

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pose upon such person or corporation the fines and penalties in said charter, by-laws or ordinances provided, for the failure to pay such license-tax or fee, for the carrying on of such business, or the doing of such act; *provided, further*, that said mayor, and other officials and employees of said city, shall, for and during the period aforesaid, have and receive, to be retained or allowed and paid out of the funds and assets vested in the commissioners herein provided for, the same compensation, and payable monthly, or in the same manner as authorized or provided under said charter, by-laws and ordinances; *provided, also*, that any necessary expenses incurred by the said mayor and councilmen, in the exercise of the said police power and jurisdiction conferred on them, for and during the period aforesaid, shall likewise be allowed and paid out of the fund derived for governmental purposes, accruing to said commissioners.

SEC. 18: "That nothing in this act contained shall destroy or impair the means or remedies for enforcing the collection of the taxes or license fees heretofore imposed, assessed or levied by or on behalf of said *City of Selma* for the current tax year, or for any year prior hereto; but the same shall be collected by the said tax-collector, under the direction and control of said commissioners and receivers, as hereinbefore provided; and no proceeding, begun or pending at the date of the passage of this act, for the enforcement of any fines or penalties for violation of any of the provisions of said charter, by-laws or ordinances, shall abate or be affected by the repeal aforesaid; and no right of property or right of action of the said *City of Selma* shall be destroyed, impaired or affected by the passage of this act; and all such rights of action and of property shall be prosecuted and enforced by said commissioners, in the name of said *City of Selma*, for the uses and purposes herein declared.

SEC. 19: "That the commissioners herein provided for shall be appointed by the Governor as herein declared, as early as practicable after the passage of this act."

(2.) "*An act to incorporate the inhabitants and territory formerly embraced within the corporate limits of the municipal corporation (since dissolved) styled the 'City of Selma,' and to establish a local government thereof.*" Approved February 17th, 1883.—Sess. Acts 1882-3, pp. 396-432.

(This act consists of 52 sections, the material parts of which only are here set out.)

"Whereas the municipal corporation styled the *City of Selma* has been dissolved, and its charter repealed, and the offices held thereunder abolished, and the inhabitants and territory thereof resolved into the body of the State; and *whereas* it is essential to the preservation of good order, and to the protection of life,

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liberty and property, that a local government be established for said inhabitants and territory ; therefore—

“SEC. 1. *Be it enacted*,” &c., “That the inhabitants residing within the territorial limits hereinafter designated and prescribed are hereby incorporated and constituted a body politic and corporate, under the name and style of *Selma*, to be governed as hereinafter provided ; and by that corporate name may sue and be sued, plead and be impleaded, grant, receive and do all other acts as natural persons, within the powers herein granted and conferred ; and may purchase and hold property, real, personal and mixed, and dispose of the same for the benefit of said municipality, and may have and use a corporate seal, which may be broken or altered at pleasure.

“SEC. 2. *Be it further enacted*, That the corporate limits and boundaries of the municipality of *Selma*, in the county of Dallas, shall be, and the same are hereby, designated and established as follows ;” prescribing the boundaries substantially as they were under the former corporation ; also conferring police jurisdiction, for certain designated purposes, within certain limits outside of these boundaries, and abating “all prosecutions now pending for the violation of the license ordinances of said *City of Selma*.”

The 3d and 4th sections relate to the division of the city into wards, and authorize the mayor and councilmen to change them at discretion ; and a proviso is added to the 3d section, “that if the boundaries of said wards,” as designated therein, “or any of them, were altered by the corporate authorities of the late *City of Selma*, said wards as so bounded and established shall remain until changed by the authorities of the municipality hereby created.”

The 5th, 6th, 7th, 8th and 9th sections relate to the election and qualifications of mayor and councilmen, and provide for a registration of voters prior to the first election, to be held on the first Monday in May, 1883 ; and this provision is added to the 9th section : “That as to and in and about the first election for municipal officers of the corporation hereby created, all and singular the acts, duties, powers and jurisdiction in this act required of, imposed upon, or vested in said mayor and councilmen and other officials, as to such elections generally, shall be performed, discharged and exercised by the mayor, councilmen and other officials of the former municipal corporation, styled the *City of Selma*, since dissolved ; which last mentioned mayor, councilmen and other officials have by law been invested with police powers and jurisdiction over the inhabitants and territory embraced in the corporation hereby created, for the purpose, and during the period therein prescribed.”

The 10th section confers on the mayor and councilmen au-

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thority to enact by-laws and ordinances for governmental purposes particularly specified, including the power to impose license-taxes on occupations, "to levy and collect taxes, as prescribed by this act, for defraying the expenses of the city; . . . and to pass all such resolutions, by-laws and ordinances, as they may deem necessary and proper for the good government of the city, not contrary to the laws of the State. And to carry into effect the powers conferred by this charter upon said mayor and councilmen, the by-laws, ordinances and resolutions heretofore passed and adopted by the said municipal corporation styled the *City of Selma*, and which remained of force at the time of its dissolution, are hereby revived and established, as and for the by-laws, ordinances and resolutions of the corporation hereby created, so far as the same are applicable and are consistent with the limited powers of the corporation hereby created, and are not in conflict with any of the provisions of this act; and the same, thus qualified, are continued of force and effect, until altered or repealed by the municipal authorities of the corporation hereby created: *Provided*, that nothing in said by-laws, ordinances or resolutions contained shall be construed as conferring upon said municipality, or its officers, any power or authority other than as prescribed and set forth in this act."

SEC. 18: "That said corporation shall have full power and authority to purchase, and provide for the payment of the same, all such real estate and personal property as may from time to time be deemed necessary and proper for the use, convenience and improvement of the city; and shall have full power and authority to construct and erect works for the purpose of furnishing water and lights for said city; and to sell and dispose of any property deemed advisable to sell."

SEC. 19: "That said mayor and councilmen may, on the faith and credit of the taxes, licenses, fines and penalties authorized by this act, borrow money from time to time, not exceeding the sum of twenty-five thousand dollars in the aggregate, in order to meet and defray necessary municipal expenses, until a fund for that purpose can be realized from the collection of such taxes, licenses, fines and penalties; and for that purpose said mayor and councilmen are authorized to execute a promissory note or notes on behalf of said municipality, for the amount so borrowed, accompanied by their order or orders addressed to such bank or banks as they may designate as the depository of such taxes, licenses, fines and penalties, and therein direct said bank or banks to apply to the payment of such note or notes so much of the funds deposited or to be deposited with such bank or banks as may be stated in such order or orders."

SEC. 27: "That the mayor and councilmen of said *Selma*

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shall have the power to levy taxes on real and personal property, capital employed in any business carried on in said city, auction sales and sales of merchandise, gross amounts of commissions, or sums received during the preceding year for each tax-year, by any factor, commission-merchant, broker or buyer; on the gross receipts of each and every business, trade or occupation conducted within, or derived from a business carried on in said city, or partly carried on therein; and on all salaries, whether received from a public or private employment, after deducting the expenses of carrying on such business, trade, occupation or employment. *Provided*, that no tax shall be levied on sales under judicial proceedings. . . . *And provided*, also, that no taxes, dues or imports shall be laid, levied, assessed or collected by said mayor and councilmen, or any other officer or agency of the corporation hereby created, upon real or personal property, occupations, sales or salaries, or by way of license, or in any other way, for any other than public municipal purposes, and to enable said corporation to discharge its functions as a governmental agency of the State; and no moneys or funds in any way derived by the corporation hereby created, from taxes, licenses, fines, penalties, or from any other source, shall ever be applied to, or be used or liable for the payment of any of the debts or liabilities created by or existing against the municipal corporation styled the *City of Selma*, lately dissolved and abolished."

SEC. 38 gives power and authority "to impose and collect from all persons or corporations trading or carrying on any business, trade or profession, by agent or otherwise, within the limits of said city, a license-tax on such business, trade, profession or calling, which shall be fixed by ordinance or by-law from time to time;" and a proviso is added, in these words: "*Provided*, also, that in any case where the late corporation, styled the *City of Selma*, may have imposed and collected in advance any tax on property or things, or any license for any of the purposes aforesaid, the corporation hereby created shall have no authority to impose or collect any tax on the same property or thing, or any license for the same calling, from the same person or corporation, for or during the period covered by said former exacted and collected tax or license."

SEC. 44: "That in no case shall the faith of the corporation hereby created be pledged for the payment of money, except to the amount, for the purposes, and by the authority in section 19 hereinbefore provided; and in no case shall the private property of citizens, or any property held and used in trust, or for public municipal purposes, be liable for any debt or obligation of said corporation; and the public and trust property heretofore so held and used by the late corporation styled the *City of*

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Selma, and afterwards transferred by law to the custody of the State, is hereby made over to the corporation hereby created, to be held, used and applied to the same public uses and trusts as when held by said former corporation."

SEC. 45 limits the rate of taxation, "on real estate, personal property, income, or other subject of taxation," in any one year, to one half of one per-cent. *ad valorem*.

SEC. 46 confers the power to establish and regulate free schools, and to levy a tax for their support, to be paid over, when collected, "to the superintendent of public schools of the city of Selma"; and further declares, "that all funds received by said superintendent, in pursuance of the business hereof, shall be applied to the support of the public schools of said city, under the direction of the city board of education, in accordance with existing acts, laws, and ordinances."

Another act of the General Assembly at the same session, relating to the same subjects, was brought forward in the pleadings; but, as it is not referred to in the opinion of the court, it is not deemed necessary to state its provisions. It was approved February 19th, 1883, and is entitled "An act to carry into effect any plan or scheme for the compromise, adjustment and settlement of the existing indebtedness of the late corporation known as the *City of Selma*, and the commissioners of the city of Selma appointed under and by virtue of" the act first above set out, approved Dec. 11th, 1882.—Sess. Acts 1882-3, pp. 471-84.

W. B. Gill, H. N. Stewart and Emile Gillman, having been appointed by the governor commissioners under the provisions of said act approved Dec. 11th, 1882, filed their bill in equity, on the 15th January, 1883, in the City Court of Selma, alleging the enactment of said law, the material provisions of which were stated in substance, and their own appointment as commissioners, and asking the instructions and protection of the court in the discharge of their duties, and the settlement of the trust. The bill alleged, also, that the dissolved corporation was indebted to the amount of about \$400,000, as evidenced by its bonds with interest coupons attached, which constituted the "funded debt" of said city; that Amy & Co., partners doing business in the city of New York, held and owned a large amount of these bonds, and had recovered a judgment on some of them which were past-due and unpaid, in the Circuit Court of the United States at Montgomery, for \$56,000, against said corporation before its dissolution; that J. O. Matthewson & Co., partners residing and doing business in the city of Augusta, Georgia, and the City National Bank of Selma, also held and owned some of said bonds, and the remaining bonds were held

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and owned by divers other persons, whose names were unknown to the complainants, and who were too numerous to make their joinder as defendants to the bill practicable; that said incorporation was also indebted, at the time of its dissolution, to other persons, its officers and agents, for salaries, wages, &c., and on liabilities contracted in and about the discharge of its governmental functions, and held certain bonds and moneys in trust for sundry public purposes, and had assessed and levied taxes for the payment of its "funded debt" and other purposes, as by law authorized, in the exercise of its functions as a public municipality; that the complainants, as commissioners, have received, and are entitled to receive under the provisions of said act under which they were appointed, moneys properly applicable to the payment of said indebtedness, as would appear in full by the statements and schedules which they were required to make and file in the court, and which they had not yet completed; and that they could not fully administer the trust committed to them, and discharge the duties imposed upon them, without the instructions, assistance and protection of the court. They therefore prayed that the court would take jurisdiction of the administration of the assets of said dissolved corporation, as a trust estate, under the provisions of said act of Dec. 11th, 1882, and make all necessary orders to render its jurisdiction complete and effectual; that the complainants be declared and held to be receivers of the court, and instructed in the performance of their duties as trustees and receivers; and that the trust might be finally settled, and the rights of all parties adjudicated.

Amy & Co., and the other creditors mentioned, were made defendants to the bill; and it was prayed that the unknown creditors might be brought in as parties by publication, as authorized by the rules of practice of the court. An amended bill was filed on the 2d April, 1883, which alleged the passage of said third act above mentioned, setting out the substance of its material provisions, and asked that the court would assume jurisdiction of the additional trust by said latter act created, and enforce and settle the same as by said act contemplated and intended.

A demurrer to the bills, original and amended, was filed by Amy & Co., assigning the following as grounds of demurrer: (1.) Because the bill shows on its face that the said act approved December 11th, 1882, "was enacted for the purpose, and with the intent and design of impairing the obligation of the contracts of the said *City of Selma*, as evidenced by said bonds in said bill mentioned, by destroying the remedy for the enforcement of said contracts, contrary to the provisions of the constitution of the State of Alabama, and said act is void."

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(2.) Because the bill shows that said act of Dec. 11th, 1882, "was enacted for the purpose, and with the intent and design to impair the obligation of the contracts of said *City of Selma*, as evidenced by said bonds in said bill mentioned, by impairing the remedy for the enforcement of said contracts, contrary to the constitution of the State of Alabama, and said act is therefore void." (3.) Because the bill does not show that plaintiffs had any authority to file it at the time the same was filed. (4.) Because the bill does not show that plaintiffs had any lawful authority to act as commissioners of said *City of Selma*. (5.) Because the bill shows that these defendants are not proper parties defendant thereto. (6.) Because the bill shows no necessity for making these defendants parties defendant thereto. (7.) Because no fact is stated in the bill showing that any of said bonds held by these defendants is or are invalid, either in whole or in part. (8.) Because the purpose of said bill, and of said acts therein referred to and set forth, "is to force these defendants, and other holders of the bonds of said *City of Selma*, to accept less than the amount of the principal and interest of said bonds, without stating any legal or equitable defense to said bonds, or any part or either of them." (9.) Because the bill "does not show that complainants have any right of action, legal or equitable, against these defendants." (10.) Because the bill shows "that said municipal corporation called *Selma* is the successor of said corporation called the *City of Selma*, and said successor corporation is a necessary party to said amended bill, yet it is not made a party defendant thereto." (11.) Because complainants do not, in their said bill, "aver or state any legal or equitable right in themselves to file said bill against these defendants." (12.) Because the bill shows that these defendants are not proper parties thereto.

The court overruled the demurrer, and its judgment and decree to that effect is now assigned as error.

In the other case (*Amy & Co. v. Selma*), the action was commenced by summons and complaint, sued out on the 27th July, 1883, by said Amy & Co. against said corporation called *Selma*; and was founded on a judgment for \$7,668.12, besides costs, recovered by said plaintiffs, on the 3d December, 1879, in the Circuit Court of the United States at Montgomery, against said former corporation, the *City of Selma*. The original complaint alleged the rendition of the judgment, and the jurisdiction of the court; and after averring the subsequent passage of said two acts approved respectively on the 11th December, 1882, and the 17th February, 1883, further alleged "that the inhabitants and territory formerly embraced within the corporate limits of said *City of Selma* are, by said act last named,

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embraced within the corporate limits and jurisdiction of the municipality of *Selma*, and said municipal corporation in said last named act called *Selma* is the successor to, and liable for the debts of the *City of Selma*; wherefore plaintiffs claim of said defendant," &c. An amended count was afterwards filed, by leave of the court, which alleged that, on the 3d December, 1879, "the *City of Selma*, a municipal corporation then existing, was indebted to said plaintiffs in the sum of \$7,668.12, the principal and interest then due on certain bonds and coupons, which had theretofore been duly and legally issued by said *City of Selma*, under authority conferred on said City of Selma by the legislature of the State of Alabama;" and then alleged the rendition of the judgment, the jurisdiction of the court, the passage of said two statutes, &c., in the same words as the original complaint.

The defendant demurred to the complaint, original and amended, assigning the following as grounds of demurrer to each count: (1.) Because it shows "that the former corporation therein described, known as the *City of Selma*, and against which said judgment is alleged to have been recovered in the year 1879, afterwards, and heretofore, to-wit, on the 11th day of December, 1882, by virtue of said act of the General Assembly in that behalf, in said complaint referred to, was abolished, dissolved, and abrogated, and thenceforth ceased to exist." (2.) Because it shows "that said defendant corporation, known and designated as the municipality of *Selma*, by virtue of said act of the General Assembly in that behalf, in said complaint described, was created, incorporated, and brought into existence on the 17th day of February, 1883, long after the recovery of said judgment, and long after the dissolution of said former corporation." (3.) Because said complaint shows "that said former corporation, called the *City of Selma*, and said defendant corporation, designated as the municipality of *Selma*, are two separate, distinct, independent and non-contemporaneous corporations and bodies public and politic; and it nowhere appears in what way, or by what means, the said latter corporation is liable for the alleged debts of said former corporation, and it appears, on the contrary thereof, that said latter corporation is in no wise liable or answerable, at law, for the alleged debts, or any debts or liabilities of said former corporation." (4.) Because said complaint "does not show that the alleged coincidence, as to inhabitants and territory, between said former and said latter corporation, constitutes the latter corporation a successor to, or renders the same liable at law, for the debts of said former corporation, but the contrary thereof appears in and by said complaint." (5.) Because "no cause or ground of action, by or on behalf of plaintiffs,

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against the said defendant corporation, is stated, set forth, or in any [manner] disclosed in or by said complaint."

The court sustained the demurrer, and, the plaintiffs declining to amend, rendered judgment for the defendant; and this ruling and judgment are now assigned as error.

PETTUS & DAWSON, for the appellants in each case.—By an act of the General Assembly approved Dec. 17, 1859, the *City of Selma* was authorized to subscribe for stocks in railroads, and to issue its bonds in payment of the stock, and to levy a tax of one per-cent. *per annum* for the payment of such bonds; and the 6th section of the act further declares, "that the faith and credit of said city, and all the property, means and effects of the same, shall be irrevocably pledged for the payment" of such bonds. —Sess. Acts 1859-60, p. 271. By a subsequent act, approved Feb. 8, 1866, said city was authorized to issue bonds to fund the interest on its bonded debt, and to levy a tax of one per-cent. *per annum* to pay the principal and interest of the bonds so issued; and it was further provided, "that the moneys arising from taxes authorized by this act to be collected shall be set apart for the payment of the interest and principal of the bonds by this act authorized to be issued."—Sess. Acts 1865-6, p. 512. By another act, approved Feb. 23, 1872, said city was authorized to establish a "sinking fund" for the payment of its bonded debt, and to levy a tax of one per-cent. *per annum*, "which shall be in lieu of all taxes now levied for the payment of the bonded debt;" and it is further declared, that these provisions "are not intended to supersede the power delegated" to said corporation by said act approved Dec. 17, 1859, above cited, "but to be in extension of the same;" and the 6th section calls this tax "a special tax."—Sess. Acts 1871-2, p. 372. In addition to these special legislative provisions relating to the debt of said city, the charter approved Dec. 4, 1868, conferred on it power to levy and collect taxes to pay the expenses of the city, which tax was not to exceed one per-cent.; but, for the purpose of meeting and adjusting the then "present obligations," power was conferred to "borrow money," and to issue bonds, and for the payment thereof, principal and interest, to "mortgage, or pledge in such other manner as may be deemed best, all the property owned by said city," and to "pledge such amount of the taxes which the corporation may by law levy as may be thought best;" and the tax authorized to be levied "for the payment of debts already contracted" is unlimited.—Sess. Acts 1868, p. 365. The 30th section of the new charter, approved March 8th, 1875, is a copy of the section above quoted from the former, as to levying and pledging taxes; and it further limits the rate of tax on real estate to one

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per-cent., "except for the payment of debts already contracted." Sess. Acts 1874-5, p. 356.

These legislative provisions, the validity of which is not questioned, and under which the bonds held by the appellants were issued, were of force when the several acts were passed which are now brought to the consideration of the court, by which the said corporation is dissolved, its property transferred to the State, and another corporation created, embracing the same territorial limits and the same inhabitants, and under a charter substantially the same except as to debts and taxation. These acts, the appellants contend, so far as they impair the value of said bonds, or destroy the means of enforcing them, are violative of the constitutional provision, Federal and State, which inhibits the passage of any law "impairing the obligation of contracts."—*Railroad Co. v. Man. Co.*, 16 Wallace, 318; *Gantly's Lessee v. Ewing*, 3 How. 716; *Bronson v. Kinzie*, 1 How. 316; *Green v. Biddle*, 8 Wheat. 75; *Von Hoffman v. Quincy*, 4 Wallace, 553. The State constitution contains an additional restriction upon this kind of legislation, by declaring that there can be no law impairing the obligation of contracts, "by destroying or impairing the remedy for their enforcement."—Art. IV, § 56. Some effect must be given to this provision, else its insertion was nugatory; since a former provision inhibited the passage of any law impairing the obligation of contracts.—Art. I, § 23. Another provision, while limiting the general rate of taxation by municipal corporations to one half of one per-cent., confers upon every one then existing and indebted the power to levy an additional tax of one per-cent., "to be applied exclusively to such indebtedness." Art. XI, § 7. This section, the appellants insist, confers upon such corporations a power which cannot be taken away, lessened, or impaired by legislation.

That municipal corporations, so far as they are invested with subordinate legislative powers for local purposes, are mere instrumentalities of the State for the convenient administration of their affairs, and are subject to the legislative will and discretion of the General Assembly—that they may be created, changed, regulated and abolished, at pleasure—is not denied. But this principle is subject to constitutional qualifications, and it can not so operate as to allow the General Assembly, under cover of regulating a municipal corporation, or even dissolving it, to destroy the obligation of existing contracts which that corporation had authority to make. To say that the General Assembly can not enact a law impairing the obligation of contracts, but may by law abolish a municipal corporation, and thereby destroy the obligation of the existing contracts that corporation was authorized to make, would be a judicial ab-

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surdity. When a municipal corporation is authorized to take stock in a railroad company, or to engage in any other business or transaction not public in its nature, and to issue its bonds in payment of the obligation thereby incurred, it becomes, to that extent, a private corporation, and its obligations are secured by all the constitutional guaranties which protect the engagements of individuals or private corporations.—*Von Hoffman v. Quincy*, 4 Wallace, 555; *Gantly's Lessee v. Ewing*, 3 How. 716; *Bronson v. Kinzie*, 1 How. 316; *Mount Pleasant v. Beckwith*, 100 U. S. (10 Otto), 514, 529; *Broughton v. Pensacola*, 93 U. S. 269; *O'Connor v. Memphis*, 6 Lea, Tenn. 730.

That the new corporation, called *Selma*, is liable for the debts of the *City of Selma*, is shown by the cases last above cited: 10 Otto, 514; 93 U. S. 269; 6 Lea, 730.

BROOKS & ROY, *contra*.—1. Without regard to the constitutional questions involved, the general equity of the bill filed by the commissioners rests on their possession of a trust fund, which they received in good faith, and which enures to the benefit of the defendants and other creditors; and they invoke the jurisdiction and assistance of the court, to secure a proper distribution of that fund.—*Merricether v. Garrett*, 12 Otto, 530, and authorities there cited; *Railroad Co. v. Branch & Co.*, 59 Ala. 139. If the legislation in question effected only the dissolution of the corporation known as the *City of Selma*, and was inoperative for every other purpose; still the special equity remains, that the court will pursue and lay hold of the property and effects of a dissolved or disorganized corporation, and apply them to the payment of its debts.—*Railroad Co. v. Branch & Co.*, 59 Ala. 153; *Curran v. Arkansas*, 15 How. 307; *Dummer v. Wood*, 3 Mason, 308; *Beckwith v. Racine*, 7 Biss. 142; *Maenhaut v. New Orleans*, 2 Woods, C. C. 108; 1 Dillon Mun. Corp. § 37.

2. The two enactments approved respectively on the 11th December, 1882, and the 17th February, 1883, are separate and distinct laws, with intervals of several months in their passage; and the provisions for the application of the assets of the old corporation are separable from those alleged to be obnoxious to constitutional objections. The bill continues equity, without the aid of the provisions assailed as unconstitutional; and the provisions which are unassailed, being separate and distinct from the others, may stand alone.—*Davis v. Minge*, 56 Ala. 121; Cooley's Lim. 177-8, 3d ed.

3. The defendants are proper and necessary parties to the bill, because they are entitled to share in the fund to be distributed. The new corporation is neither a proper, nor a necessary party. It was created after the original bill was filed,

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and it has no interest in the assets to be distributed by the court. Besides, it is a new and distinct corporation, created several months after the dissolution of the former, and under a charter containing different powers.—1 Dill. Mun. Corp. § 52.

4. If the legislation in question is valid and operative, none of the questions raised by the demurrer arise; and the validity of these laws is beyond controversy. The courts are not at liberty, in passing on the validity of legislative acts, to impute improper or unlawful motives or purposes to the General Assembly; nor is there any room for such imputation in this case, since provision is made for the appropriation of the assets of the dissolved corporation to the payment of its debts.—*Merriwether v. Garrett*, 12 Otto, 511.

5. The power of the State to abolish and dissolve a municipal corporation, which is a mere governmental agency, can not be doubted.—*Merriwether v. Garrett*, 12 Otto, 472, 500, 511; *Wolff v. New Orleans*, 13 Otto, 358, 366; *Dartmouth College Case*, 4 Wheaton, 630; *State v. Mayor of Mobile*, 24 Ala. 705; 8 Peters, 281; 1 Dill. Mun. Corp. § 52; Cooley's Const. Lim. 191-3, 276-7. Every person who contracts with such corporation is charged with a knowledge of this principle, and takes his contract with this legal incident annexed, as if it were specially incorporated in the contract.—Cooley's Const. Lim. 193, 276; 4 Wheaton, 630; 12 Otto, 511; 2 Lea, Tenn. 425, 433.

6. The provision in the Federal constitution against laws impairing the obligation of contracts, and the several provisions of the constitution of the State of Alabama on the same subject, mean one and the same thing. The former was judicially construed by the Supreme Court of the United States, which is the final arbiter for the decision of such questions (*Wilson v. Brown*, 58 Ala. 62), as prohibiting laws which substantially destroy or impair the remedy (*Gunn v. Barry*, 15 Wallace, 623); and the provisions of the State constitution were only intended to give effect to this principle.

7. The provision of the State constitution which limits the rate of municipal taxation, with an exception in favor of the existing indebtedness of such corporations, is neither an enabling, nor a self-executing provision, but is a pure limitation and restriction in the strictest sense. It fixes a maximum, but not a measure of municipal taxation; and the measure is in each case, within the maximum, to be found in the charter of the particular municipality.

PER CURIAM.—These causes, involving substantially the same questions, have been considered in connection, and the following conclusions have been reached by the court:

[Amy & Co. v. Selma.]

1. The act of the General Assembly, approved December 11, 1882, entitled "An Act to vacate and annul the charter, and dissolve the corporation of the city of Selma, and to provide for the application of the assets thereof to the payment of the debts thereof," operated a dissolution of the corporation known as the "*City of Selma*;" a withdrawal from it of all governmental power which had been confided to it, except so far as the act authorized the continued exercise of such power. But, upon debts and liabilities which had been created or contracted by the corporation, in the exercise of power with which it had been clothed by the General Assembly, the act was without operation. These debts or liabilities were not lessened in obligation, nor extinguished; nor is it within the competency of legislative power to lessen them in obligation, or to extinguish them.

2. The act is not objectionable, so far as it authorizes the appointment of commissioners, and confers upon them, when appointed, authority to take charge of, collect and control the assets of the former corporation of the "*City of Selma*," making of them the application which is required by law. Nor is it objectionable, so far as it authorizes the commissioners to apply to the "City Court of Selma," on the equity side thereof, for instruction, direction and protection, in the performance and discharge of their duties. Nor is it objectionable, so far as in this respect it may be considered a grant of jurisdiction to said court, nor in the mode of procedure which it prescribes.

3. The act plainly does not contemplate a temporary or permanent deprivation of the people residing within the territorial limits of the "*City of Selma*," of the power of local government, as they had been accustomed to exercise it; nor does it contemplate a suspension or cessation of such government, for any appreciable period of time. On the contrary, the creation of another municipal government, to which substantially the same people and territory would be subject, is plainly contemplated.

4. The subsequent act of the General Assembly, approved February 17, 1883, entitled "An act to incorporate the inhabitants and territory formerly embraced within the corporate limits of the municipal corporation (since dissolved), styled the *City of Selma*, and to establish a local government therefor," is an execution of the intent manifested in the prior act. It is a reorganization, under the corporate name and style of "*Selma*," of the same corporators, and embraces substantially the same territory. The corporation "*Selma*" is the successor of the "*City of Selma*," the preceding corporation, and is bound to the payment of the debts and the satisfaction of the liabilities of its predecessor.

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5. This obligation resting upon it, when created, it became a necessary party to the bill filed by the commissioners on the equity side of the City Court, under the provisions of the act approved December 11, 1882.

6. The suit at law, founded on the judgment rendered against the "*City of Selma*," is maintainable against its successor, "*Selma*."

The decreë and judgment of the City Court must each be reversed, and the causes remanded.

NOTE BY REPORTER.—This case was decided on the last day of the last term—July 31st, 1884; and it was then announced by C. J. BRICKELL that an opinion would be written out in full. But no other opinion has ever been filed in the case.

Rapier v. Gulf City Paper Company.

Gulf City Paper Company v. Rapier.

Bill in Equity by Assignee of Newspaper Establishment, for Account, Receiver, Redemption, etc.; Cross Appeals.

1. *Mortgage, or conditional sale; construction of conveyance.*—An instrument can not operate as a mortgage, and at the same time as a conditional sale; and when it contains repugnant provisions, rendering its character doubtful, it will be construed as a mortgage rather than as a conditional sale.

2. *Same.*—The existence of a debt, which had been reduced to judgment, and the preservation of which, with its execution lien on the property conveyed, is expressly provided for in the instrument, with the right to levy on any other property of the debtor, if the debt is not paid in installments as specified, stamps the character of the instrument as a mortgage, although it is called a "bill of sale," and although it declares that the grantee "becomes in all things the absolute owner of said property, the said party of the first part having only the right to re-purchase the said property upon the consideration and conditions named."

3. *Usury in mortgage; stipulations construed.*—A provision in a mortgage for the payment of \$2,500 within thirty days, "and securing to be paid" in installments, "as hereinafter stated, all debts that may at the time be due to said party of the second part from the party of the first part, with the interest thereon, and all reasonable costs, charges, fees and expenses," does not, *per se*, render the mortgage usurious; the stipulation being susceptible of the construction, that the \$2,500 was to be a partial payment on the debt, and not as a *bonus* in addition to it.

4. *Same.*—The mortgaged property consisting of a newspaper office, with job-printing office attached, which had been conducted at a loss by the mortgagors, the mortgage is not rendered usurious by a stipulation that the mortgagee shall not be liable "for any profit or revenue he may derive from the use of the property."

[Rapier v. Gulf City Paper Co.]

APPEALS from the Chancery Court of Mobile.

Heard before the Hon. JOHN A. FOSTER.

This case has been before this court on two former appeals, and is reported in 64 Ala. 330-45, and 69 Ala. 476-82. The original bill was filed on the 15th May, 1877, by the Gulf City Paper Company, against John L. Rapier, Joseph Hodgson, the personal representative of John Forsyth, deceased, and several other persons who held or claimed some lien upon or interest in the printing establishment known as the *Mobile Register* office; and sought the appointment of a receiver to take charge of the property pending the suit, an account, a foreclosure of the several mortgages and other liens prior to the complainant's claim, and the enforcement of the complainant's rights as a purchaser under an instrument of writing, a copy of which was made an exhibit to the bill, and which was in these words:

"The State of Alabama,) For and in consideration of
Mobile County.) \$5,035 to us in hand paid, at
and before the sealing and delivery of these presents, the receipt
whereof is hereby acknowledged, we, John Forsyth, John L.
Rapier and Joseph Hodgson, parties of the first part hereto, do
hereby bargain, sell, assign, transfer, set over and deliver to the
Gulf City Paper Company, the party of the second part, the
property known and described as the *Mobile Daily and Weekly
Register* newspaper, and all the property and materials in and
belonging to the printing establishment thereof, and of the job-
printing and book-binding establishment, and of the offices con-
nected therewith, with the rights, contracts and privileges at-
taching thereto, and including the property mortgaged by said
Forsyth to E. B. Lott, trustee, &c., and also to C. K. Foote, L.
Brewer and A. Proskauer, trustees to secure certain bonds, and
including the property levied on and now held by the sheriff
of Mobile county, under an execution and *vend. ex.* issued on a
judgment obtained by said Gulf City Paper Company, in Mo-
bile Circuit Court, against said Forsyth and Rapier: *And
whereas*, said company did, at the Spring term, 1876, of said
Circuit Court, obtain judgment against said Forsyth and said
Rapier, for the sum of \$5,000, with costs of suit, and an execu-
tion therefor, which is a lien on said property; and after the
said execution Hodgson purchased from said Forsyth a half of his
interest in and to said property: *And whereas*, the sheriff, under
said execution, did duly levy, and advertise said property for sale
to satisfy said judgment and execution, on Thursday, Novem-
ber 30th, 1876: *And whereas*, said sale was, by agreement,
postponed until Thursday, the 14th day of December, and, on
the return of the execution, a *vend. exponas* duly issued to sell
said property so levied on: *And whereas*, said sale was again
postponed, until this day: *And whereas* said property is in-

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cumbered with a mortgage, and, if sold at sheriff's sale, would not bring more than, if as much as said judgment: *And whereas*, all parties concerned deprecate the public sale of said property, as being injurious to the future interest of said newspaper, by whomsoever conducted or owned: *And whereas* there is no legal right of redemption of said property, if sold: *And whereas* the sale and transfer of said property herein made is to the interest of all, and to the prejudice of none of the parties concerned: *It is agreed* between the parties, that the said party of the second part, upon the payment to it, within thirty days from these presents, of \$2,500 in cash, and the securing to be paid, as hereinafter stated, all debts that may at the time be due it from said parties of the first part, or any of them, together with the interest thereon, and all reasonable costs, charges, fees and expenses, paid or incurred by said company in and about obtaining said judgment, or arising therefrom, and of the execution, levy, and *venditioni exponas*, postponements of the sale, and of the execution of necessary papers between the parties, and the principal and interest, if any such, paid or incurred by said second party on account of any other or prior judgment to theirs; all of which are to be secured by good and approved securities, to be paid in three equal installments, at two, four, and six months; then the said party of the second part will forthwith sell, and re-transfer and deliver to them, the said first parties, for and upon the said consideration, and according to their respective interests, the property herein sold, transferred and delivered, by the first to the second parties hereto, or such portion thereof as may at the time be in existence. Or, if said first parties shall pay said \$2,500 within the said thirty days, and shall make payment of the other sums, in the installments, and at the times above provided; thereupon, the last of said payments so being made, the said company will sell, transfer, and deliver said property as aforesaid. It is further understood and declared, that the said company does by this bill of sale become in all things the absolute owner of said property, and not liable in any way to account to or with the said first parties, for or on account of the use of said property, or for any profit or revenue that may be derived therefrom; the said first party having by these presents only the right to re-purchase the said property, for the consideration, and upon the conditions named. And the said second party is hereby authorized and empowered to take and collect the outstanding book-accounts and credits of the firm of John L. Rapier & Co., and to pay and settle the current debts of the newspaper and office, and of the firm, and shall account therefor to and with said firm, or the members thereof, in reference to said collections and settlements, as shall be agreed. And the said first

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parties do hereby covenant, to and with the said second party, that said property is free from any incumbrance made or suffered by them, or any of them, excepting the deed of trust, or mortgage, executed by said Forsyth to C. K. Foote, Leroy Brewer and A. Proskauer, trustees. And it is agreed, that said company shall not lose or forfeit any lien or right that it may have secured, to have the said judgment satisfied by a sale, under *venditioni exponas* or execution, of said property hereby sold and transferred, or of any other property; and it is agreed that the said sale may be adjourned from time to time, at the instance of the said company, or a new execution be sued out on its judgment, or both. And it is agreed, also, that until the re-purchase of said property by the first party, upon the above agreed terms, or until seven months after the date hereof, said judgment shall be and remain valid and effective for all purposes, as a subsisting security to said second party, for a complete and perfect title to said property herein conveyed, and for the undisturbed possession thereof for the said time mentioned, against any one claiming by, through, or under any of said first parties, or in privity therewith, or by any one on account of any thing done or suffered by said parties, or either of them. In testimony whereof," &c. (Dated December 18th, 1876, and signed by said Forsyth, Rapier, Hodgson, and the acting president of said company.)

The original bill claimed that the building in which the *Register* newspaper and printing business was carried on, and the title to which had been in the name of said Rapier individually, or some interest therein, was conveyed by said instrument to the complainant; but this court, on the first appeal (64 Ala. 330), held that this claim was unfounded; and the bill was then amended, by striking out all the allegations and prayer in reference to this property. It was further held on that appeal, that the only equity of the bill was in the complainant's right, under the instrument above copied, to have the several liens and prior incumbrances on the property adjusted, and the property sold to satisfy them. An amended bill was then filed, in which the complainant claimed the right to redeem as a judgment creditor; and that aspect of the case was passed on by this court, on appeal from the chancellor's decree overruling a demurrer to the bill as amended.—69 Ala. 476. The former reports of the case contain full statements of the material facts as then presented, but which are not necessary to an understanding of the questions arising on this appeal; nor is it necessary to state any facts connected with the prior liens and mortgages referred to in the instrument above copied.

Rapier filed a demurrer to the original bill, assigning as ground of demurrer, among other things, that the written in-

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strument was a mortgage, while the complainant claimed relief as an absolute purchaser; and he afterwards filed a plea, alleging usury in the debt secured by it. The cause being again submitted, on the demurrer, pleadings and evidence, the chancellor held that the instrument was a mortgage, and that the complainant was entitled to have it foreclosed under the general prayer for relief; but he held that it was not usurious on its face, and that the defense of usury was not sustained. Each party appeals from this decree, and each here assigns error; the complainant, that the chancellor erred in holding the instrument to be a mortgage, and not a conditional sale; and Rapier, that he erred in holding that the defense of usury was not sustained.

CLARK & CLARK, and R. H. CLARKE, for the complainant. (1.) The conveyance is, on its face, not a mortgage, but a conditional sale, or a sale with condition annexed allowing a repurchase, which has now become absolute by non-performance of the condition. It contains many characteristics of a bill of sale, as it is termed on its face, and none of the characteristics of a mortgage. When analyzed, the instrument may be divided into eight parts, or sections: 1st, a sale or conveyance of the property; 2d, a statement of the judgment, which was the consideration of the transfer; 3d, a statement of the reasons why a private sale was preferred, rather than a public sale under the execution; 4th, a statement of conditions upon which the property might be re-purchased, providing two modes; 5th, an explicit declaration that the instrument is intended as a bill of sale, and that only a right or election to re-purchase is left in the transferrors; 6th, authority to the purchaser to collect the outstanding accounts of Rapier & Co., pay certain debts, and account to the firm or its members; 7th, warranty as to incumbrances; and, 8th, preservation of judgment for seven months, as security for title and possession. The first section is apt and appropriate for a sale, whether absolute or conditional; whereas, in a mortgage, it should be followed by words of defeasance, unless the defeasance is written on a separate paper.—Jones on Mortgages, vol. 1, §§ 69, 277; *Peebles v. Stolla*, 57 Ala. 53; *Logwood v. Hussey*, 60 Ala. 417; *Sewell v. Henry*, 9 Ala. 24; *Bryan v. Cowart*, 21 Ala. 92. The recitals of the second and third clauses, which are to be taken as true, are natural explanations of a sale, but are singularly inappropriate for a mortgage. The transferees, armed with an execution which had been levied on the property, might with reason desire to recite the facts which would show that the transaction was fair; but, while the recitals show good reasons why a private sale should be preferred, they suggest no reasons for taking a mortgage. The

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fourth clause binds the transferee to re-sell, but contains no clause binding the transferrors to re-purchase; and this is one of the principal characteristics of a conditional sale.—*Logwood v. Hussey*, 60 Ala. 417; *Beck v. Blue*, 42 Ala. 32. The fifth clause is an explicit declaration of the character of the instrument and the intention of the parties; and the court is bound to enforce the contract of the parties as thus expressed, in the absence of averment and proof of fraud or mistake.—*Haynie v. Robertson*, 58 Ala. 39; cases cited in 2 Brick. Digest, 271, §§ 316-17. The sixth clause is explained by the fact, that the purchaser of the property could collect the outstanding debts to better advantage than the outgoing vendors, who abandoned the field as ruined debtors; and they could complete unfinished contracts for advertising, subscriptions, &c., which could not be collected until completed. The provision for the application of the surplus proceeds of collection is utterly repugnant to the idea of a mortgage. The warranty against prior incumbrances is persuasive to show that a sale was intended, and is an unusual provision in a mortgage, being useless and inoperative. The eighth clause provides for the preservation of the judgment for a limited time, not for collection, but expressly for protection; not against the judgment debtors, but against third parties, who might assail the validity of the transaction. The explanation of this clause is to be found in the provisions of the Bankrupt Law, which allowed creditors six months within which to attack a conveyance; and under the practical application of this law, as then administered, it was at least doubtful if the transaction would not be impeached by creditors, as was in fact attempted in their name; and in view of this contingency, it was desirable that the lien of the judgment should be temporarily preserved. Nor was the judgment kept alive, even for this period, unconditionally, but only in the alternative of a failure to comply with the condition for a re-purchase. If no re-purchase had been made, and the property had been destroyed by fire, or other accidental cause, after the expiration of seven months, the grantee's title and possession not having been disturbed; can it be doubted that the loss would have fallen on the complainant, and that the collection of the judgment could not then have been enforced?—*Robinson v. Farrelly*, 16 Ala. 472. In addition to all of these characteristics of a conditional sale, it is to be noted that the instrument is signed by both parties, which is unusual and unnecessary in a mortgage; and it provides that the grantee shall take immediate possession, without liability to account for the use of the property.—*Jones on Chattel Mortgages*, § 33.

2. The contemporaneous acts and declarations of the parties show that they understood the contract to be a conditional sale,

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and so intended that it should operate; that a private sale was simply substituted for a sale under execution. And the pleadings, in effect, admitted the facts showing that this was the intention and understanding of the parties.

3. This question is not concluded by the decision of this court on either of the former appeals, as the chancellor seemed to think; the complainant's rights being the same, on each appeal, whether the instrument was a mortgage or a conditional sale.—64 Ala. 330; 69 Ala. 476.

4. The question of usury does not arise, unless the instrument is held to be a mortgage; and that defense is interposed only by Rapier, who did not plead it until after the cause had been pending for six or eight years. Under these circumstances, the defense should be disallowed, "in furtherance of justice."—Tyler on Usury, 458, 464; *Fulton Bank v. Beach*, 1 Paige, 429; 3 Wendell, 573, 586. If the defense be allowed at all, it is only available to Rapier, and to the extent of his original interest.—*McGuire v. Van Pelt*, 55 Ala. 350; *Cuin v. Gimon*, 35 Ala. 168; *Baskins v. Calhoun*, 45 Ala. 582; *Fielder v. Varner*, 45 Ala. 429; Tyler on Usury, 406; 2 Jones Mort. § 1493, note 3. Even if the plea is sustained as to the mortgage so-called, the judgment is unaffected by it.—1 Jones Mort. § 647; Tyler on Usury, 111, 126, 370–71, 401; 2 Bac. Abr., tit. *Usury*, 200; 1 Saund. 295; 10 Amer. Dec. 228, 675; 83 N. C. 211.

5. But the instrument is not usurious on its face. The \$2,500, for the payment of which a stipulation was inserted, was not intended as a *bonus* over and above all existing debts; and that construction will not be placed on the clause, if it be reasonably susceptible of any other.—Tyler on Usury, 566. By making the payment within thirty days, the defendants secured an extension of the debt for two, four, and six months; and by giving security for the deferred payments, they could obtain the immediate possession of the property. But, whatever construction be placed on the stipulation, the defendants were not bound to pay the \$2,500, but only had an election to do so; and that defeats the charge of usury.—Tyler on Usury, 56, 101, 204; *Call v. Scott*, 4 Call, Va. 402; *Lawrence v. Coules*, 13 Illinois, 577; *Wilson v. Dean*, 10 Iowa, 432; *Gower v. Gower*, 3 Iowa, 244; *Lloyd v. Scott*, 4 Peters, 225; *Moore v. Hylton*, 1 Dev. Eq. 429; *Thompson v. Jones*, 1 Stew. 553; *Ramsey v. Morrison*, 39 N. J. Law, 591. The business was precarious, and had been carried on by the grantors at a loss; and the grantee undertaking to carry it on at his own risk, the stipulation for the use of the property, without liability to account for any possible profits, does not render the conveyance usurious.—*Wright v. Alexander*, 11 Ala. 236.

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HANNIS TAYLOR, with whom was P. HAMILTON, *contra*.—1. In the absence of any allegations or proof of either fraud or mistake in the execution of the written instrument, it is the sole memorial of the terms of the contract, and must be construed, "by its four corners."—*Frederick v. Youngblood*, 19 Ala. 680; *Couch v. Woodruff*, 63 Ala. 467; *Williams v. Hathaway*, 19 Pick. 387; *Winston v. Browning*, 61 Ala. 83; *Hogan v. Smith*, 16 Ala. 604. On its face, the instrument contains at least four of the principal characteristics of a mortgage. It shows that the relation of debtor and creditor then existed between the parties; the debtor continued bound for the debt, and express provision was made for its preservation; there was great disparity, as recited, between the value of the property and the agreed price, or the amount of the debt; and the property was allowed to remain in the possession of the debtors. These are the conclusive tests of a mortgage, and stamp the character of the instrument beyond controversy.—*Peebles v. Stolla*, 57 Ala. 58; *Eiland v. Radford*, 7 Ala. 724; *Williamson v. Culpepper*, 16 Ala. 211; *Turnipseed v. Cunningham*, 16 Ala. 501; *Crews v. Threadgill*, 35 Ala. 342; *Locke v. Palmer*, 26 Ala. 312; *Building Assn. v. Robertson*, 65 Ala. 382; *Russell v. Southard*, 12 Howard, 139. This court, on each of the former appeals, in effect placed this construction on the instrument.—64 Ala. 330; 69 Ala. 476.

2. The instrument is usurious on its face. The stipulation for the payment of \$2,500 as a *bonus*, over and above the debt, is of the essence of usury, and is decisive of the question. *Graeme v. Adams*, 23 Gratt. 225; 14 Amer. Rep. 230; *Jackson v. Kirby*, 37 Vt. 448; 7 Wait's Ac. & D. 603; *Cummins v. Wire*, 2 Halst. Ch. 73; *Matlock v. Mallory*, 19 Ala. 694; *Munter & Faber v. Linn*, 61 Ala. 496; *Gleason v. Burke*, 20 N. J. Eq. 300; 50 N. Y. 437; Tyler on Usury, 156, 325. The additional stipulation for the use and possession of the property, without liability to "account to or with the said first parties for or on account of the use of said property, or any profit or revenue that may be derived therefrom," is equally usurious.—*Brown v. Vredenburg*, 43 N. Y. 195; *Thomas v. Murray*, 34 Barb. 157; *Sweet v. Spence*, 35 Barb. 44; *Uhlfelder & Co. v. Carter*, 64 Ala. 533; *Building Assn. v. Robertson*, 65 Ala. 390.

3. Although one defendant has defaulted, he may have the benefit of the defense of usury, when interposed by another. *Tappan v. Prescott*, 9 N. H. 531; 7 Wait's Ac. & D. 630; 47 Ala. 377.

4. The mortgage being usurious, the complainant can recover neither interest nor costs.—*Hunt v. Acre*, 28 Ala. 580;

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Noble v. Walker, 32 Ala. 459; *Bradford v. Daniel*, 65 Ala. 133; *Dawson v. Burrus*, 73 Ala. 111.

SOMERVILLE, J.—The questions raised in these cross-appeals involve the construction of the agreement between the parties litigant, bearing date December 18th, 1876. The first point of contention is as to the nature of this instrument—whether it is a mortgage, or a conditional sale. It is very obvious that the difficulties of construction lie in its duplex character, involving, as it does, a clear attempt to make a conditional sale, and at the same time preserve the continued existence of the debt, and bind the property for the security of its payment. The provisions of the agreement are, therefore, somewhat repugnant in their nature, the law not permitting that to be done which seems to have been attempted. The instrument must be construed to be either a mortgage or a conditional sale—it cannot be both at one and the same time.

The rule has long been settled in this State, that, in cases of doubt, the courts are always inclined to construe contracts to be mortgages, rather than conditional sales. The reason is, that no great injustice can be perpetrated, so long as the creditor recovers his debt with legal interest, while much oppression may often result by the inability of the debtor to promptly re-purchase the property at precisely the time specified. An error of judgment, in other words, which may convert the transaction by construction into a mortgage would not be so oppressive or injurious as a like error which might change a mortgage into a conditional sale.—*Crews v. Threadgill*, 35 Ala. 334; *Turnipseed v. Cunningham*, 16 Ala. 501.

It must be admitted, that the form of the contract under consideration favors the view that it is a conditional sale. This, however, is not a controlling fact, but is dominated by the intention of the parties—mere matters of form being made to yield to those of substance.—*Eiland v. Radford*, 7 Ala. 724. The designation of the instrument as “a bill of sale,” and the declaration that the grantee is to be regarded as the “absolute owner of the property,” with the right on the debtor’s part only to “re-purchase,” are not conclusive of the legal nature of the contract. They must yield to the potent facts, that the relation of debtor and creditor subsisted between the parties before the alleged sale; that the disparity between the value of the property and the price agreed to be paid for it is great; and, above all, that the debt itself is not satisfied or extinguished by the fact of the alleged sale.—*Turner v. Wilkinson*, 72 Ala. 361; *Eiland v. Radford*, 7 Ala. 724. As said by this court, in *Peebles v. Stolla*, 57 Ala. 53, “one of the tests by which to determine whether or not a mortgage was intended, is

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the existence or not of a debt to uphold it. If there is no debt, there can be no mortgage. On the other hand, security for a debt is incompatible with the idea of a conditional sale, and when shown to exist, is conclusive that the transaction is a mortgage.

In the present case, the continued existence of the debt is preserved,—at least until what is denominated as the “re-purchase” of the property by the debtor, or until seven months after date of the agreement. It is expressly declared, that the creditor “shall not lose or forfeit any lien or right that it may have secured to have the said judgment satisfied by a sale, under *venditioni exponas* or execution, of said property hereby sold and transferred, or of any other property,” but that the judgment, to which the debt had been reduced, “shall be and remain valid and effective for all purposes, as a subsisting security” to the judgment creditor. The preservation of the judgment in all its original force, with the right to levy upon and sell the property of the judgment debtor, is clearly a preservation of the debt, which was the sole vital principle of the judgment. The instrument, in its inception, being a mortgage, it would continue to have this character impressed upon it, until foreclosure, or the purchase of the equity of redemption from the debtor upon a new consideration. This is upon the settled maxim of equity, “once a mortgage, always a mortgage.”

This conclusion is in accord with the view expressed by us when this case was last before us on appeal. It was then said as to this agreement, *per* BRICKELL, C. J.: “It is apparent from the most casual inspection of the agreement between the parties, that it was not intended the transfer of the personal property should operate as a satisfaction of the judgment, or embarrass or impair the rights or remedies of the appellee as a judgment creditor. Security for the payment of the judgment, and all other debts due the appellee, was all that was contemplated; and such security was intended to be afforded, while the debtors were to be saved from the injury apprehended from a forced sale of the property, the right of redeeming by payment of the debts being secured to them.”—*Rapier v. Gulf City Paper Co.*, 69 Ala. 476, 482-83.

It is contended on behalf of Rapier's counsel, in the appeal taken by him, that the mortgage debt is usurious. The first ground taken is, that the agreement, above construed to be a mortgage, exacts not only the payment of the mortgage debt and interest, but an additional sum of twenty-five hundred dollars as a *bonus* required to be paid, as a pre-requisite to a re-purchase or redemption of the property by the debtors. The stipulation is, that the grantee will re-transfer the property, if the debtor pay this sum within thirty days, and secure by good and approved security, payable in three installments, “all

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debts that may at the time be due it [the judgment creditor] from the parties of the first part," together with interest, and certain expenses incurred. The amount of these debts, or of the several installments, is not specified. The agreement, therefore, is not incompatible with the theory, that the twenty-five hundred dollars should be regarded as a *payment* on the debt, and not as a *bonus* for forbearance. The law would so regard it, unless a contrary intention appears by clear implication; especially in view of the fact, that usury is prohibited by statute, and is visited with the penalty of a forfeiture of the entire interest, and the taxation of full costs.—Code, 1876, §§ 2092, 3130. The rule is universal, that where a contract is susceptible of two constructions, one of which will render it legal, and the other illegal, the court will incline to adopt the construction which will uphold the contract and preserve its validity. It is our opinion, that the agreement is not usurious on this ground.

It is further argued, that the contract is rendered usurious by the stipulation, that the creditor should have the use of the property without being held liable for any profit or revenue that might be derived from it. It may perhaps be true, as contended by counsel, that when a lender of money stipulates for a contingent benefit over and above the right to demand payment of his debt with legal interest in any event, the contract will, in such case, generally be held to be usurious. But usury, as often said, is chiefly a matter of intention, and the burden of proof is cast upon him who sets up the defense by seeking to impeach the legality of any given transaction.—*Dozier v. Mitchell*, 65 Ala. 511, 518; 2 Parsons on Bills and Notes, 405-6. Hence it is held, that where the lender takes upon himself any real risk of loss, other than the insolvency of the borrower, the contract is not necessarily usurious. It was said in *Wright v. Alexander*, 11 Ala. 236, that "to constitute usury, there must be a certainty of receiving more for the use of money, than legal interest. If there is a hazard of losing, so that the lender may receive less than legal interest, or lose the principal, the contract is not *per se* usurious, but may be declared so if the contract was a mere device to evade the statute."

The use of the property, in the present instance, was fraught with great hazard of loss. This property consisted of a daily newspaper, with a job-office attached, which was at the time in operation, but appears to have been carried on at considerable pecuniary loss to the owners. If the mortgagee continued the business, it is necessarily implied from the terms of the agreement that he should do so at his own risk. If he did so, and incurred any loss, he would certainly be liable for it to the

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creditors who might be damnified. It was possible, therefore, that, under the contract, the mortgagee might imperil and actually lose in the enterprise an amount greatly larger than the interest of his entire debt, if not a large portion of the principal. This, in our judgment, rescued the agreement from the vice of usury, which is sought to be imputed to the intention of the contracting parties.—2 Parsons on Bills and Notes, 412, 413.

We have considered the questions involved, without regard to the parol evidence which was introduced for the purpose of construing the intention of the parties. It is proper to add, that this explanatory testimony, if considered by us, would not authorize us to come to any other conclusions than those which we have announced.

These views result in an affirmance of the decree of the chancellor on both appeals, which is accordingly ordered, such decree being, in our opinion, free from all error.

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Statutory Detinue for Goods, by Vendor against Remote Purchaser.

1. *Fraudulent purchase of goods; rights of seller.*—When an insolvent purchaser obtains goods by misrepresentation, or by fraudulent concealment, having at the time no intention to pay for them, the seller may disaffirm the sale, and reclaim the goods, as against the fraudulent purchaser, or any one claiming under him with notice of the fraud.

2. *Same; sub-purchase for value, without notice; innocent sufferers by wrongful act of third person.*—If the goods have passed into the hands of a sub-purchaser for valuable consideration, without notice of the fraud, his right is superior to that of the original vendor, and the latter can not recover the goods from him; the principle applying as between them, that where one of two innocent persons must suffer by the wrongful act of a third person, the loss must fall on him who put it in the power of that person to perpetrate the wrong; and a remote sub-purchaser is equally entitled to protection against the claim of the vendor, when either he or any one of the intermediate purchasers acquired the goods for valuable consideration without notice.

3. *Same; who is purchaser for value.*—Merely agreeing to take the goods in payment of an indebtedness past-due, and entering a credit on the account for the price, without surrendering anything valuable, does not entitle the creditor to protection as a purchaser for valuable consideration; *secus*, if he takes them in absolute payment and satisfaction, and surrenders the evidence or securities of his debt.

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4. *Same; burden of proof as to notice.*—When the vendor has proved that the goods were obtained from him by the fraud of the purchaser, it is incumbent on the sub-purchaser, claiming protection against the rights of the vendor, to show that he paid value for them; but, when he has done this, the *onus* is on the vendor to prove that he had notice of the fraud.

5. *Charge misplacing burden of proof.*—When the evidence is conflicting as to a material fact, a charge misplacing the burden of proof must work a reversal, without regard to the preponderance of the evidence.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WM. E. CLARKE.

This action was brought by the appellees, who were merchants doing business in the city of New York, and who sued as partners, against Abraham H. Spira, to recover a large quantity of goods, which the plaintiffs had sold to one S Vogel, and which the defendant claimed as a sub-purchaser from Vogel; and was commenced on the 8th December, 1883. The cause was tried on issue joined, and a bill of exceptions was reserved by the defendant during the trial, in which the facts are thus stated:

“On the trial, there was evidence tending to show the following: Plaintiffs were in October, 1883, and had been for several years prior thereto, wholesale dealers in clothing, residing and doing business in the city of New York. During that time, S. Vogel did a retail clothing business in the city of Mobile, and there were dealings between him and plaintiffs in the line of their business; he buying goods from them on credit, and making his notes to them for such purchases. During and after the summer of 1883, at sundry times, he obtained money from them, by having them discount his notes, and raised money by inducing them to accept his drafts drawn on them. He represented to them, during the whole time he so did business with them, that he was a solvent and prosperous merchant, fully able to pay for all the goods purchased by him from them, and to protect them as to all notes discounted and all drafts accepted for him by them. Prior to his purchase of the goods here sued for, he had repeatedly promised them to remit to them weekly, and to pay his notes, given for merchandise purchased, as they matured, and had repeatedly broken such promises. From about August, 1883, up to his purchase of the goods now sued for, he had continually drawn on them, and telegraphed them untruths to get them to accept his drafts; and he had kept peculiar books of account, which could not be understood without his personal explanation. Plaintiffs had examined his said books several times, before said purchase.—generally about once a year; but he was present with them on each of said examinations, and fully explained his books, and plaintiffs then fully understood them; all of which

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facts were known to plaintiffs before they sold him the goods now sued for, except that the representations which he telegraphed to them, to get them to accept his drafts, were untrue, and they did not know such representations to be untrue until after they had sold and delivered to him the goods now sued for. Said Vogel purchased from plaintiffs the goods now sued for in October, 1883, on a credit of six months, and obtained said goods upon representations to them that he was a solvent and prosperous merchant, and would be able to pay for them; but he was then insolvent, and had known his insolvency for more than one year prior to his purchase of said goods. Plaintiffs shipped the goods to him, from New York, in October, 1883; and they were received by him, and put on sale in his store, in the usual way, about the first of November, 1883. A portion of said goods were sold by him during the month of November, and he sold the remainder, being about eighty percent. of the whole, to Bernstein and Mrs. Schonfeld, as hereinafter stated.

"Prior to the first of December, 1883, said Bernstein and Mrs. Schonfeld had each loaned money to said Vogel, or paid out money for him at his request; he had collected sundry sums of money for Mrs. Schonfeld, on debts due her, and had used the same for his own benefit; and there was then money due from him to said Bernstein, for money so paid for him, the sum of three thousand dollars; and to Mrs. Schonfeld, for money loaned to him, and for her money so collected and used by him, the sum of ten thousand dollars; and all of said debts were then past-due. On said 1st December, 1883, said Bernstein and Mrs. Schonfeld were indorsers for said Vogel on negotiable promissory notes then running to maturity, but not due, held by other parties, to the amount of fourteen thousand dollars; and such other parties had taken such notes in settlement of a real indebtedness to them by said Vogel, for the whole amount thereof, and were justly entitled to be paid the whole amount of said notes as they matured. On said 1st December, 1883, said Vogel sold absolutely to said Bernstein and Mrs. Schonfeld his stock of goods, the consideration of such sale being the absolute satisfaction of his said past-due indebtedness to them, so amounting to thirteen thousand dollars, and their agreeing, absolutely and unconditionally, to fully pay each of said notes as they matured, on which they were indorsers for him, and to protect him against all liability to pay any part thereof; which agreement was in writing, signed by them, and delivered to said Vogel at the time said sale was made; and said consideration was equal in amount to the fair value of the goods so sold. Vogel delivered to them all the goods on the

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day of sale, and among said stock were the goods sued for in this action.

“At the time of said sale, neither Bernstein nor Mrs. Schonfeld had any knowledge of the fraud practiced by said Vogel on plaintiffs to induce them to sell him said goods, or notice of any facts which, if followed up, would have informed them of such fraud; and they paid each of said promissory notes at maturity, the payment of which had been assumed by them, amounting to fourteen thousand dollars. About five days after their purchase of said goods from Vogel, said Bernstein and Mrs. Schonfeld sold said entire stock of goods, including the goods here sued for, to the defendant in this action, and gave him a written warranty of title to said goods. Said sale to defendant was made absolutely and unconditionally, and without any benefit or trust therein being reserved to said Bernstein, Mrs. Schonfeld, or any one else. Defendant paid for said goods by delivering to said Bernstein and Mrs. Schonfeld, at the time of said sale, the check of one Pincus on a bank for three thousand dollars, payable on demand, and his own negotiable promissory notes, payable in bank, and indorsed by him, for the remainder of the price; and said check and notes were the full value of the property so purchased by him. At the time of said purchase and payment, defendant had no knowledge of the fraud practiced by said Vogel on plaintiffs, through which he had induced them to sell him said goods, and no notice of any facts which, if followed up, would have informed him of such fraud. Plaintiffs never did any act towards disaffirming their sale of the goods to Vogel, until about two days after said goods had been thus sold and delivered to defendant, and after he had delivered to said Bernstein and Mrs. Schonfeld the check and promissory notes in payment thereof. Said check of Pincus was held by Bernstein for several days, without being presented to the bank; but this was done of his own motion, and without any request on the part of said Pincus or the defendant; and it was then taken up by defendant, who gave his own bank check to said Bernstein, payable on demand, for the same amount, which check was at once presented to the bank by said Bernstein, and was paid. Said promissory notes given by defendant to said Bernstein and Mrs. Schonfeld were, each and all, paid by him at the time and place they became due; but no one of them was paid, nor was said check paid, until after plaintiffs had disaffirmed their sale to said Vogel.

“There was evidence on the part of the plaintiffs tending to show the following: That there was a close blood relationship between said defendant and said Bernstein and Mrs. Schonfeld, and that each of them was closely connected with said S. Vogel by marriage, as follows: Spira's uncle married Vogel's sister;

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Vogel married a first cousin of Spira, and Vogel's brother married another one of Spira's cousins. Spira was a nephew of said Bernstein, and of Mrs. Schonfeld, each of whom was connected with said S. Vogel, in three ways: Said Bernstein and Mrs. Schonfeld are brother and sister; a younger brother of theirs married Vogel's sister; Vogel married the daughter and only child of Mrs. Schonfeld, and his brother, Herman Vogel, married the daughter of said Bernstein. Said Herman was also, at this time, a partner in business with Bernstein. That each of them had notice of the fraud practiced by said Vogel on plaintiffs to induce them to sell him said goods, before Vogel sold to said Bernstein and Mrs. Schonfeld. That said Vogel had, some years before his purchase of said goods, raised money from other parties in Mobile, upon promissory notes on which the names of said Bernstein and Mrs. Schonfeld were forged as indorsers. That a part of the alleged debt from said Vogel to Mrs. Schonfeld, in satisfaction of which his sale to them was made, was simulated; that the property so sold was worth much more than the consideration alleged to have been paid by them; and that the sale by them to the defendant was merely intended to cover up the property, and more effectually put it beyond the reach of Vogel's creditors.

"The court charged the jury, generally, that if any part of the consideration paid by Bernstein and Mrs. Schonfeld to Vogel, for the goods sued for, was the satisfaction of an antecedent debt due from Vogel to them, or to either of them, then they were not *bona fide* purchasers for value, and such purchase by them was no bar to plaintiffs' recovery in this suit."

The defendant excepted to this part of the general charge, and he requested the following charge, with others, which were in writing: "6. If the jury believe, from the evidence, that Vogel sold the goods to Bernstein and Mrs. Schonfeld at a fair price, in payment of his indebtedness to them, and in consideration of their paying other debts due by him, before plaintiffs had done any act toward disaffirming the sale of such goods; then, even though Vogel obtained the goods from plaintiffs by a fraud, his sale to them vested in them a good title; unless the jury shall further find from the evidence that, at the time of such sale, they had knowledge of said fraud of Vogel, or notice of such facts as, if followed up, would have informed them of such fraud; and in such case, the burden of proving such knowledge or notice is upon the plaintiffs, and they must prove the same to the satisfaction of the jury." The court refused this charge, and the defendant excepted to its refusal.

The charge given, and the refusal of the charges asked, are now assigned as error.

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OVERALL & BESTOR, with whom was R. H. CLARKE, for appellant.—(1.) The satisfaction of an antecedent debt is a *bona fide*, legal consideration, which the courts will uphold and sustain.—*Crawford v. Kirksey*, 55 Ala. 282; *Hodges Brothers v. Coleman & Carroll*, 76 Ala. 103; *Lehman v. Kelly*, 68 Ala. 192; *Meyer & Co. v. Sulzbacher*, 76 Ala. 120. Although merely entering a credit on an account past-due, without surrendering anything valuable, does not constitute a *bona fide* purchase for value; yet the principle does not apply here, since it is shown that Bernstein and Mrs. Schonfeld paid out thirteen thousand dollars, in addition to their antecedent debt, and the defendant paid out twenty-three thousand dollars, none of which was an antecedent indebtedness.—38 Maine, 561. The cases cited for appellees, as to fraudulent conveyances founded partly on a valid debt, have no application to the defendant in this case, who is two degrees removed from Vogel, and no part of the consideration paid by him was fictitious, fraudulent, or antecedent. (2.) The plaintiffs alleged fraud, and the burden of proving it was on them.—*Thames & Co. v. Rembert's Adm'r.*, 63 Ala. 561; *Tompkins v. Nichols*, 53 Ala. 197.

J. L. & G. L. SMITH, *contra*.—1. To the extent that the property was taken by Bernstein and Mrs. Schonfeld in payment of an antecedent debt, their purchase did not cut off the right of plaintiffs, as original vendors, to reclaim the goods. *Loeb & Bro. v. Peters & Bro.*, 63 Ala. 249; *Loeb & Bro. v. Flash Brothers*, 65 Ala. 542; Bump Fraud. Conv. 63–65; *Buffington v. Gerish*, 15 Mass. 156; *Barnard v. Campbell*, 58 N. Y. 73. The right of stoppage *in transitu* depends upon the same principle.—*McDonald v. Fairwell*, 3 Otto. An analogous principle holds that a judgment creditor, purchasing at his own sale under the execution, is not a *bona fide* purchaser for value.—*Devoe v. Brant*, 53 N. Y. 462. Nor can Bernstein and Mrs. Schonfeld claim anything on account of their assumption of the outstanding notes, on which they are liable as indorsers for Vogel; for they did not thereby part with anything valuable, nor incur any new or increased liability. The decisions of this court cited for appellant, holding that the payment of an antecedent debt constitutes a valuable consideration sufficient to protect the purchaser against prior equities, each involved a conveyance of the grantor's own property, honestly owned by him; in some of them, the parties complaining of injury suffered by their own *laches*; and they all rest on the necessities of commerce. The exact question, where the property of another, acquired and held by fraud, was given in payment of an antecedent debt, was first presented in *Loeb & Bros. v. Peters*, 63 Ala. 249.

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2. Under the circumstances of the case, the burden of proof was on the defendant to show that, at the time of his purchase, he had no knowledge or notice of the fraud practiced on plaintiffs by Vogel. Although the evidence introduced by the defendant tended to show that, at the time he contracted for the purchase of the goods, he had no notice or knowledge of Vogel's fraud; yet the fact was undisputed, that his notes and check, given for the price, were not paid until several days after plaintiffs had disaffirmed the sale. Until that payment was made, his purchase was not complete, as against plaintiffs, and he was not injured; and he was charged with knowledge, before he made it, that plaintiffs had reclaimed the goods. The evidence was undisputed, too, as to the fraud and insolvency of Vogel, the near relationship of all the parties, the knowledge of the fraud on the part of the defendant's immediate vendors, and the sale of the entire stock of goods in each case; and there was evidence tending to show that the sale to the defendant was merely intended to cover up the property, and more effectually put it beyond the reach of Vogel's creditors. Under this state of facts, the burden was on the defendant to show a valuable consideration paid by him in good faith, and to explain all the suspicious circumstances attending the transaction.—*Hubbard v. Allen*, 59 Ala. 283; *Harrell v. Mitchell*, 61 Ala. 270. The defendant could not, then, have been injured by the charge as to the burden of proof.

CLOPTON, J.—The instructions given and refused present, as the first question raised by the assignment of errors, whether the payment or satisfaction of an existing debt is a consideration sufficient to defeat the vendor's right of recovery against a purchaser without notice from a fraudulent vendee. The sale of the entire stock of goods, whether in the usual course of trade or otherwise, is a matter addressed to the jury in determining the *bona fides* of the transaction, and is not presented by the record for our consideration.

Though of comparatively modern origin, the doctrine is now firmly grafted on the jurisprudence of both England and this country, that a vendor, induced by misrepresentation, or fraudulent concealment, to sell goods to a purchaser who is insolvent, and has no intention to pay for them, may disaffirm the sale, and reclaim the goods, as against the fraudulent vendee, or any person claiming under him with notice of the fraud. The rule is founded on the requirements of honest and fair dealing; and as said by STONE, J., is "a growth upward in commercial morals." It rests on the fundamental principle, that no person can, in good conscience, be allowed to take and retain the property of another, without paying the consideration price, or without a

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bona fide intention, at the time of purchase, to pay for it. There can be no question of the plaintiffs' right of recovery, if the controversy were between them and their vendee.

2. The vendor, on acquiring knowledge of the fraud, must promptly disaffirm the sale. The supervening right of a purchaser from the fraudulent vendee, for value, and without notice of the fraud, is superior to the equity of the original seller, and operates to defeat his title to the goods sold. This is on the familiar principle, that where one of two innocent persons must suffer from the wrongful act of a third person, the burden must fall on the one who puts it in the power of such third person to perpetrate the wrong. To entitle a sub-purchaser to protection, he must be without notice of the fraud, and must have parted with something valuable on the strength of the property, and on the faith of the possession and apparent right to sell of his vendor. The goods sued for were sold by the plaintiffs to Vogel, in October, 1883, and were sold by him, with the balance of his stock, to Bernstein and Mrs. Schonfeld, on December 1, 1883, in consideration of the satisfaction of a precedent indebtedness of \$13,000, and an agreement in writing to pay certain notes, of the aggregate amount of \$14,000, on which they were indorsers for Vogel, and to protect him against any liability to pay any part thereof. Bernstein and Shonfeld subsequently sold the stock of goods to defendant, the consideration being a check for several thousand dollars, and negotiable notes for the remainder of the purchase-money. If Bernstein and Shonfeld, and the defendant, or either of them, were purchasers for value without notice, the plaintiffs are not entitled to recover.

3. Counsel for appellees rely on the rule, as held in *Loeb & Bro. v. Peters*, 63 Ala. 243, which was a case of stoppage *in transitu*, and in *Loeb & Bro. v. Flash Brothers*, 65 Ala. 726, which was a case similar to this. In each it was held, that entering a credit for the value of the property on the past-due account of an insolvent debtor is not a sufficient consideration to defeat an action by the defrauded vendor. In the latter case it is said: "Merely entering a credit on an account past-due, without surrendering anything valuable, would not, under any circumstances, constitute them *bona fide* purchasers, so as to defeat an action such as this." The reason is stated in the first case, where it is said, the purchaser has nothing more to do, in order to get even, than to debit his vendor with the same sum, for non-delivery of the goods, in consequence of the defect in title. The purchaser, in neither case, changed his position, or parted with anything valuable.

It is settled doctrine in this State, that "receiving negotiable paper in payment of a precedent debt can not be distinguished

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from purchasing it with money, or taking it in payment for property sold; and when it is so received, it is taken in the usual course of trade, and the holder is entitled to protection "against latent equities between the original parties.—*Reid v. Bank of Mobile*, 70 Ala. 199; *Bank of Mobile v. Hall*, 6 Ala. 639. While a mortgage given to secure an antecedent debt, the mortgagee parting with nothing of value *in presenti*, is insufficient as protection against outstanding equities; if the consideration of the mortgage is the security of a debt based on an extension of the time of payment, the mortgagee is a purchaser for value, and, if innocent, is entitled to protection. And the payment of an existing indebtedness is a sufficient consideration to maintain and uphold an absolute conveyance, there being no secret trust or benefit reserved, against the claims of other creditors of the debtor, though he is insolvent, and the known effect is to leave him without means to pay his other debts. *Whitfield v. Riddle*, at present term; *Rogers v. Adams*, 66 Ala. 600; *Crawford v. Kirksey*, 55 Ala. 282. A purchaser who parts with value, either in money, securities, or other property, or who, by the transaction, materially changes his position to his consequent detriment, on the faith of his vendor's clear right of sale, is entitled to be protected against latent equities of which he had no notice.—*Whelan v. McCreary*, 64 Ala. 319.

It is insisted in the argument of counsel, that the rule which prevails when the property received in payment of a precedent debt is indisputably the property of the debtor, which he has an undoubted right to apply to the payment of his honest debts, is inapplicable, where the property has been obtained by fraud, and it is subject to the right of the seller to retake it on discovering the fraud. The inapplicability of the rule is based on the general doctrine, that "no one can transfer to another a better title than he has himself." To the general doctrine there are well recognized exceptions, one of which is, "when the owner, *with the intention of sale*, parts with the property, though under such circumstances of fraud, as would authorize him to reclaim it from the vendee."—*Leigh Bros. v. Mo. & O. R. R. Co.*, 58 Ala. 165. When the intention is to transfer both possession and property, it is a contract of sale, and the property passes, however fraudulent may have been the means used to effect it. The contract is not void *ab initio*, but voidable at the election of the seller. But, until he elects to avoid, "if his vendee transfers the goods, in whole or in part, whether the transfer be of the general or of a special property in them, to an innocent third person for a valuable consideration, the rights of the original vendor will be subordinate to those of such innocent third person."—1 Benj. on Sales, §§ 648, 649.

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The innocent purchaser is without fault; he acts on the faith of ostensible ownership and right of disposition, on which he is authorized to repose, there being no attendant suspicious circumstances. The owner, by the contract of sale, has clothed his fraudulent vendee with all the *indicia* of ownership and right of sale. A purchaser may buy with equal confidence and safety, where the appearances of ownership, created by the original owner, are such as to produce a reasonable belief of its actuality, as also where it is in fact absolute and unconditional. We discover no satisfactory reason why the rule of protection, which is extended to a creditor receiving negotiable paper, or an absolute conveyance of property admitted to be the debtor's, should not be equally available to a purchaser from a fraudulent vendee, whether such vendee accepts a conveyance of the property with intent to defraud the creditors of his grantor, or obtains it by fraudulent devices, from his vendor.

As said above, we held in *Loeb & Bro. v. Flash Brothers, supra*, that merely entering a credit on a past-due account, for the value of the property, is not a consideration that will constitute the creditor a purchaser for value, for the reason, that it is not, on failure of the creditor to obtain or retain the goods, a payment. The distinction is between an *agreement* to receive goods in payment of an existing indebtedness, and an *actual satisfaction* of the indebtedness; as where the creditor, by the purchase, materially changes his position, and gives up something of value on the strength of the property, such as a surrender of the evidences of indebtedness, or prior security. If the creditor's title should fail, by reason of his debtor's fraud in getting the goods, his debt still remains unsatisfied, and the right of the original owner to avoid his sale, and recover the goods from the transferee of his fraudulent vendee, will not be defeated. But, if the creditor's debt is, by the transaction, in fact and in law satisfied, he will, if innocent, receive the protection of a *bona fide* purchaser against the equity of the defrauded vendor.—*Shufeldt v. Pease*, 16 Wis. 659. The sufficiency of the evidence to show that the satisfaction of an existing debt was part of the consideration paid for the goods is addressed to the consideration and determination of the jury, under proper instructions from the court. It is not our province to intimate an opinion, and if it were, the record does not disclose the necessary facts. We merely decide, that assuming the hypothetical fact stated in the charge—if any part of the consideration was the *satisfaction* of an antecedent debt due by Vogel to Bernstein and Mrs. Schonfeld, or either of them—it was error to instruct the jury they were not *bona fide* purchasers for value.

4. The remaining question relates to the burden of proof as
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to notice of the fraud of Vogel. On the hypothesized facts, that the defendant purchased the goods from Bernstein and Mrs. Schonfeld in good faith, and paid them a fair and valuable consideration before the disaffirmance of the sale by plaintiffs, the court refused to instruct the jury, that the burden of proving defendant had notice of the fraud of Vogel in obtaining the goods, was on the plaintiffs. As a general rule, the *onus probandi* is on the party holding the affirmative, though the rules of pleading may require a negative averment by the adversary party. The question, on which party was the burden of proving notice of infirmities in a negotiable paper that had been transferred, was before this court in *First National Bank v. Dawson* (at present term), where it was held, that on the issue of notice *vel non*, the burden of proof was on the affirmant. The same rule applies in the case of a purchase from a fraudulent vendee. When the plaintiffs proved that Vogel had obtained the goods from them by fraudulent devices, it was incumbent on the defendant to establish that he was a *bona fide* purchaser; that is, that he actually purchased and paid value. Proof of payment of value and a purchase casts on the plaintiffs the *onus* of showing that the defendant, at the time of the purchase, had notice of the fraud, if by such notice they seek to subordinate his right to theirs.—*Easter v. Allen*, 8 Allen, 7.

5. Counsel have earnestly pressed upon our attention the sufficiency of the evidence to show *mala fides* in the purchase by Bernstein and Mrs. Schonfeld, and by the defendant, and that they were chargeable with notice of the fraud of Vogel, for the purpose of establishing the conclusion, that the instruction on the burden of proof did not affect them injuriously, and is not a reversible error. We must decline to enter on the consideration. The record recites there was evidence tending to prove both phases of the case. Which phase was proved, was a question for the jury. When there is conflicting evidence, it can not affirmatively appear that a charge misplacing the burden of proof works no injury.

Reversed and remanded.

Union Refining Co. v. Barton.

Action for Breach of Written Executory Contract.

1. *Contract between manufacturing company and agent for sale of goods, construed; rights and duties of respective parties.*—Under an executory contract between a private corporation, engaged in the business of refining cotton-seed oil at Montgomery, Alabama, and an agent employed to introduce and establish a market for the sale of its oils in Georgia; by which it was stipulated that, for three years, the agent was to have the sole right of selling the company's oils in Georgia, through himself and his sub-agents, was to pay the expenses of himself and his agents, was to receive as compensation ten per cent. of the amount of his sales, and was to be subject to the orders of the company; *held*, that the company was necessarily bound, in the exercise of good faith in carrying out the objects and purposes of the contract, to furnish the oils with which to fill the agent's contracts; that its orders, to which the agent was subject, related to the matter of making sales, the mode and manner of delivery and payment, and the price to be charged for the oils; that these orders were to be given in good faith, in honest promotion of the common undertaking; and that, in regulating the price, the company was neither required to sell its oils at a loss, nor authorized to raise the price above a fairly remunerative profit, which would defeat or substantially hinder sales, in order to get rid of the agency.

2. *Same; subsequent order as to sales for cash or on credit.*—A letter written by the company to the agent, a few months after the inception of the contract, saying, "In all cases, have buyers remit by post-office order, if possible, on delivery, as we prefer it in all cases, and do not mention thirty days acceptance, except in extreme cases, and be sure they are all good men,"—is not a modification of the contract, but a reasonable order, to which the agent was bound to conform in making future sales; and it authorized him to sell on thirty days time, only when such indulgence was necessary to effect a sale, and only to solvent purchasers.

3. *Same; revocation of license to sell on credit.*—The agent objecting to this restriction, as not authorized by the contract, and replying that he did not guaranty any sales made on credit; a letter then written to him by the company, saying, "Henceforth you are not authorized to sell bills that you do not guaranty," is a revocation of the former license to sell on thirty days time to solvent purchasers, and takes away the agent's right to sell on credit without becoming himself the guarantor of the bills.

4. *Same; profits as damages.*—In an action for the breach of such contract on the part of the company, the agent can not recover as damages the supposed profits which he would or might have realized from sales during the entire period stipulated for the continuance of the contract. Such damages are entirely speculative, and no rule can be laid down by which they can be accurately ascertained or measured.

5. *Same; assignment of breaches.*—An averment in the complaint, as a breach of the contract, that the company has failed and refused to pay plaintiff the stipulated compensation, is not a sufficient assignment, without an additional averment of sales made and their amount; and an averment that the company, after plaintiff had begun to introduce and

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sell its oils in Georgia under the contract, sent another agent there for that purpose, without the knowledge or consent of plaintiff, is not a sufficient assignment of a breach, without an additional averment that plaintiff was still performing his duties under the contract when the agent was so sent.

6. *Same; proof of sales made.*—The amount of sales made by the plaintiff, while engaged in the business of the agency, is competent evidence for him, as tending to furnish a basis for fixing his compensation for the services rendered, but not as affording a guide for estimating future or prospective profits.

7. *Evidence admissible for one purpose only.*—When evidence is offered which is admissible for one purpose only, it can not be excluded from the jury on motion, but a charge should be asked limiting its effect.

8. *Charge having tendency to mislead; not reversible error.*—A charge given which has a tendency to mislead the jury, is not a reversible error: an explanatory charge should be asked.

APPEAL from the City Court of Montgomery.

Tried before the Hon. THOS. M. ARRINGTON.

This action was brought by John K. Barton, against the Union Refining Company, a private corporation engaged in business in the city of Montgomery; was commenced on the 18th September, 1882, and sought to recover damages for the defendant's alleged breach of a written contract, which was in these words: "This contract, made and entered into on this 28th day of November, A. D., 1881, by and between the Union Refining Company of Montgomery, Alabama, and John K. Barton, of said State and county, *witnesseth*, that the said Barton undertakes to travel to introduce and sell in the State of Georgia the oil of the said Union Refining Company, of which C. H. Dudley is president, and to take such other means as he may deem advisable for its thorough introduction, at his own expense, and to be subject to the orders of said company. In consideration thereof, the said Union Refining Company agrees to give to said Barton the territory of the State of Georgia, and to pay on all the sales of oil in the said territory a commission of ten per-cent. to the said Barton. The time and terms of this contract are hereby agreed to and made for the term of three years, with the privilege of renewal by consent of both parties at the end of said term. In witness whereof," &c. Signed by both parties.

The complaint alleged the execution of this contract, setting it out in full, and the plaintiff's performance and compliance with all of its stipulations on his part up to the time of the alleged breaches by the defendant, and assigned the following breaches: (1.) "In that said defendant has failed and refused to pay to said plaintiff, on all sales of oil in the State of Georgia, of said company, ten per-cent. commissions, as stipulated in said agreement." (2.) "In that said defendant, after plaintiff had begun to introduce and sell the oil of said company in said

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State of Georgia, according to the terms of said contract, employed and sent out another person into said State, to introduce and sell its oil, without the knowledge or consent of plaintiff."

(3.) "In that said defendant, after plaintiff had begun to introduce and sell the oil of said company in said State of Georgia, according to the terms of said contract, failed and neglected to furnish the oil to fill the sales thereof made by plaintiff in said State." (3½.) "In that said defendant, after plaintiff had

entered upon the performance of his part of said contract, failed and refused to allow plaintiff to sell its said oil in said State of Georgia, at a fair and reasonable market price."

(4.) "In that said defendant, after plaintiff had entered upon the performance of his part of said contract, refused to furnish and supply its oil to fill the sales thereof made by plaintiff in said State, unless plaintiff would sell such oil at prices sufficiently above the fair market price of such oil in said State to make his ten per-cent. commissions, over and above such market price." (5.) "In that said defendant, after plaintiff

had entered upon the performance of his part of said contract, refused to allow plaintiff to introduce and sell its said oil in said State, unless plaintiff would guarantee all sales so made by him."

(6.) "In that said defendant, to-wit, in June, 1882, after plaintiff had entered upon the performance of his part of said contract, instructed plaintiff to offer its said oil in the State of Georgia at seventy cents per gallon, while said defendant was at that time offering the same oil in said State at a much

lower rate, to various parties in said State," mentioning the names of several persons, "and who were customers of plaintiff in said oil trade."

(7.) "In that said defendant, after plaintiff had entered upon the performance of his part of said contract, and without any fault on plaintiff's part, in divers ways so interfered with and obstructed plaintiff in his efforts to introduce and sell the oil of said company in said State, as to prevent plaintiff from further and fully performing said contract for the term specified therein." (8.) "In that said defendant failed and refused to furnish and supply its oil to plaintiff for sale in the State of Georgia according to the terms of said contract, although plaintiff was at all times ready and willing to sell the same."

The defendant demurred to the entire complaint, and to each of the breaches assigned, assigning sixteen grounds of demurrer. The court sustained the demurrer to the 5th and 7th breaches assigned, and those assignments were then amended; and the court also sustained the demurrer assigned to "so much of the complaint as claims damages on account of profits on oil not sold, or "on what the complainant might have made hereafter under said agreement." The defendant then pleaded the general issue, set-off, and the statute of frauds; and the

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cause was tried on issue joined on these pleas. On the trial, as the bill of exceptions shows, the plaintiff testified as a witness for himself, that about the 1st December, 1881, immediately after the making of said contract, he went to Atlanta, Georgia, and entered on the performance of his duties under the contract, distributing samples of the defendant's oils, advertising, circulating hand-bills, making sales, and employing local agents to assist him; that he found he could effect sales more readily, in many cases, by giving credit for thirty days, than by requiring cash in all cases, and so informed the defendant by letter; that the defendant replied by letter, which was produced, instructing him not to sell on thirty days time except in extreme cases; that he objected to this restriction, and was then instructed not to sell on credit at all, unless he became himself the guarantor of the bills; that he was required by the defendant to charge sixty or sixty-five cents per gallon as the retail price of its oils, while the oils from other cities, of as good quality, were sold at fifty-five cents per gallon; that the defendant failed to fill the orders for oils sent by him, and sometimes furnished oils to his customers directly; that up to the 16th February, 1882, "he himself sold 192 barrels of oil, but he could not tell how many barrels had been sold by his agents or the company itself, having lost a portion of his order-book; and that at the time he was recalled and stopped from selling by said Dudley, the president of said company, the sales averaged three or four hundred barrels per month." The defendant objected to this evidence, as to the amount of sales made by the defendant, "on the ground that it was illegal and irrelevant;" and duly excepted to the overruling of said objections. The letters above mentioned are copied in the opinion of the court. The defendant objected to their admission as evidence, and excepted to the overruling of said objections; and numerous other exceptions were reserved to the rulings of the court in admitting evidence, which require no special notice.

The court charged the jury, "of its own motion," as follows: "If it appears to your satisfaction, from the evidence, that the contract was kept on the part of plaintiff, and that it was broken on the part of the defendant as alleged in the complaint, the plaintiff would be entitled to damages: he would be entitled to recover the actual damages sustained up to the month of February, 1882." [This date was agreed on by consent, if the court should hold the plaintiff entitled to recover at all.] "*The value of his rights under the contract would be the measure of his recovery. In arriving at their value, it would be proper for you to consider the terms of the contract, the length of time it had to run, and, if shown by the evidence, the extent of the sales*

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the plaintiff had made, and was making at the time of the breach, together with all the other circumstances in evidence. If you are of opinion, from all the evidence, that the plaintiff's rights under the contract, at the time of the breach, were in fact of no pecuniary value, then he would be entitled to nominal damages only." To each of the italicized sentences of this charge the defendant duly excepted.

The court further charged the jury, of its own motion, as follows: "If the evidence shows that the oil referred to in the contract was a cash article, then the plaintiff could, under the contract, make cash sales only. If the defendant at any time gave him authority, verbal or written, to make sales on time, the defendant could have withdrawn such authority at pleasure. *But, if the evidence shows that the defendant did give plaintiff such authority, and, while plaintiff was exercising the same, did not withdraw it, but informed plaintiff that he would be required to guarantee all such sales, such requirement, if it embarrassed plaintiff in his operations, and prevented him from making sales, was a breach of the contract."* To the italicized portion of this charge the defendant duly excepted.

The defendant also excepted to several charges given by the court at the instance of the plaintiff, among which were the following: (3.) "If the jury find, from the evidence, that the defendant has broken its contract with plaintiff, in respect of any or either of the alleged breaches set forth in the complaint, original or amended, whereby the plaintiff has been injured or damaged, then the measure of damages plaintiff is entitled to recover, as shown by the evidence, is the injury and damage he has sustained by such breach, from the time he is shown by the evidence to have entered on the performance of the contract, until the first day of February, 1883, and what the value of said contract would have been to him during the whole of said period, if it had not been broken by the defendant." (6.) "If the jury believe, from the evidence, that the defendant has failed or refused to pay to plaintiff ten per-cent. commissions on all sales of oil manufactured or refined by the defendant, and sold in Georgia, between the 28th day of November, 1881, and February, 1883; then said failure was and is a breach of said written contract offered in evidence, and plaintiff is entitled to recover of defendant such damages as he has shown by the evidence he may have sustained by such breach." (8.) "If the jury believe, from the evidence, that the one hundred barrels of the defendant's oil shown by the evidence to have been sold to Chess, Carles & Co., or any part thereof, was so sold in consequence of, or as the result of plaintiff's negotiations in Atlanta, Georgia, with the general agent of said firm, then the plaintiff is entitled to recover commissions on such portion of

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said one hundred barrels as the evidence shows was shipped into Georgia; provided the jury further believe, from the evidence, that the defendant, under all the circumstances of said transaction, as shown by the evidence, either knew, or ought to have known, that said sale of oil was in consequence of, or the result of plaintiff's negotiations with said agent; and provided, also, the jury further find from the evidence that the defendant has never paid plaintiff any commissions on such portion of said oil as they may find was so shipped into Georgia."

The rulings of the court on the pleadings, adverse to the defendant, the several rulings on evidence to which exceptions were reserved, the charges given, and the refusal of charges asked, are now assigned as error, making in all fifty-five assignments of error.

ARRINGTON & GRAHAM, for appellant, insisting on each of the assignments of error, cited the following authorities: (1.) That none of the breaches assigned in the complaint justified a rescission of the contract by the plaintiffs—Addison on Contracts, § 360; *Rankin v. Darnell*, 11 B. Monroe, 30, or 52 Amer. Dec. 557. (2.) That the damages claimed were remote, uncertain, and speculative—*Pollak & Co. v. Gantt*, 69 Ala. 373; *Howe Machine Co. v. Bryson*, 44 Iowa, 159, or 24 Amer. Rep. 735; *Griffin v. Culver*, 16 N. Y. 489; Wait's Actions & Defenses, vol. 2, p. 443; *French v. Ramage*, 2 Nebr. 254; *Burton v. Holley*, 29 Ala. 318; *Sims v. Glazener*, 14 Ala. 695; *Bolling v. Tate*, 65 Ala. 417; *Washburn v. Hubbard*, 6 Lansing, N. Y. 11; *Olmstead v. Burke*, 25 Illinois, 86; *Masterson v. Mt. Vernon*, 58 N. Y. 391.

BRAGG & THORINGTON, *contra*, cited the following authorities: Code of 1876, Forms 10 and 11, pp. 702-03; *Livingston v. Pippin*, 31 Ala. 542; *Boylston v. Sherran*, 31 Ala. 538; 36 Ala. 61; 8 Ala. 234; 7 Hill, N. Y. 61; 14 Mich. 34; 8 Barb. 412; 89 N. Y. 37; 71 N. Y. 118; 7 Cush. Mass. 516; 31 Vt. 582; 33 Vt. 80; 4 Otto, 214; 3 Woods, C. C. 287; 127 Mass. 518; 49 Vt. 304; *United States v. Speed*, 8 Wallace, 84.

STONE, C. J.—The present suit grew out of an executory agreement, containing mutual stipulations. Commencing about the first of December, 1881, it was to continue three years. The business of the corporation—appellant here—was that of refining cotton-seed oil, and the object of the contract was the introduction and establishment of a market for the sale of its oil in the State of Georgia. The agreement was in writing, signed by both parties; and by its terms Barton was constituted traveling agent, with authority to make sales, either through

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himself or agents, to pay his own and agents' expenses of every kind, and to have for his compensation ten per-cent. of the amount of his sales. He was to have the sole right of selling in Georgia; but was subject to the orders of the company. The refining company was necessarily bound to furnish the oil with which to fill Barton's contracts. The contract is very general in its expressed provisions, and, hence, many of the duties it imposes are left to the usages of such trade, if there be such, and to implications springing out of the nature of the transaction. There is no testimony of any usage in such dealings, and we need not consider that question.

What are the implications? Barton bound himself to give the service his time, his energy, and a faithful effort to make sales, and to establish a trade and market for the company's oils; and all this, in the best good faith, for the promotion of the company's interests. Save his stipulated compensation of ten per-cent., he could have no aim or interest in antagonism to the interest of the company. He must defray all expenses incident to the agency, and, in this matter, could call on the company for no assistance. He was to be subject to the orders of the company. This must relate to the matter of making sales, for there is nothing else for it to relate to. This would embrace the mode and manner of payment, and the matter of delivering the goods when sold, and also the question of price, under rules to be presently stated. He must sell for cash, unless this is varied by a usage of trade, or by authority from his principal.

The implied duties resting on the refining company were equally binding on it. They, too, must have been performed in the best of good faith, in honest promotion of the common aim to establish the desired trade. Barton was subject to the company's orders; but those orders must have been given in promotion of the enterprise, not to thwart its purposes. They could stipulate the price at which their oils should be sold, and, in doing so, could take into the account the cost of production, and the rates of their home, or other accessible markets, if such were available. If, by force of competition of an equal, or inferior grade of goods, or by cutting of rates, they could not enter into the market without a loss, the contract imposed on them no obligation to so scale down their prices, as to leave them without a reasonable profit on their merchandise. The contract was conceived in the spirit of mutual benefit. On the other hand, the contract, in its spirit, required that the price of the goods should not be raised so far above remunerative prices, as to defeat, or substantially hinder sales. Nor could the price be raised above rates which would yield a reasonable profit, as a means of getting rid of Barton's agency. And the company

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was bound, with no undue delay, to perform Barton's contracts of sale. This, for the common benefit of both parties, and in the true spirit of the contract.

About two months after Barton entered upon the agency, the company, in reply to a request of his, wrote him as follows: "When here, you mentioned about thirty days acceptance; and after thinking of it, I now say, that in all cases have buyers remit by P. O. order, if possible, on delivery, as we prefer it in all cases; and do not mention thirty days acceptance, except in extreme cases; and be sure they are all good men." "Extreme cases," mentioned in this note, must mean, that the authority was not conferred, except in those cases where the thirty days indulgence appeared to be a condition of effecting a sale, to a financially good man: only in such conditions was the thirty days indulgence allowed to be given. Now, this was in no sense a contract, nor was it the modification of a contract. No promise, or other consideration, moved from Barton. It was one of the orders, or directions of the company; properly speaking, a parol license. Such license is always sufficient excuse for any act done under it while it is allowed to stand, but no longer. It can be revoked or modified at the will or caprice of him who grants it.—*Chambers v. Seay*, 73 Ala. 373.

On the 21st March, 1882, the company wrote to Barton as follows: "You favor of 20th inst. received, and noted. In reply to your statement, that you do not guarantee any bills, and such was not contemplated in our contract, I will only say that, *henceforth, you will understand that you are not authorized to sell bills that you do not guarantee*, and that this has always been our understanding of the arrangement between us." The authority to sell on thirty days time being only a license, and not a contract, the company was authorized to modify it; and the order of March 21st, copied above, was so far a modification of the license previously given, as to take away Barton's right to sell on time, without himself becoming the guarantor of the payment.

It was contended by the appellee in the court below, and the contention is renewed here, that the refining company violated, and thus broke up the contract, in the spring of 1882, and thereby injured plaintiff, in this; that it deprived him of the opportunity of earning and realizing large profits, which he could have done, if permitted to continue in the agency. The company does not concede that it violated its contract; but it takes the position, that, if this issue should be determined against it, the damages claimed are of the class called speculative, can not be estimated with proximate certainty, and therefore can not be recovered, no matter how closely they may have followed the breach. The precise form of the argument

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is, that no standard can be furnished for estimating such damages. In *Brigham v. Carlisle*, at the present term—a case not distinguishable from this on the point under discussion—the question was very carefully considered, and we reached the conclusion, that such damages depend on too many contingencies to be the subject of a recovery. We need not repeat the argument.—See, also, *Cin., Selma & Mobile Railway Co. v. Evans*, at the present term; *Pollock v. Gantt*, 69 Ala. 373. In fact, the success of such enterprise depends on so many contingencies, that we can conceive of no means of making the necessary proof, on which to found a verdict. No rule for such ascertainment can be predicated. Past success in the same, or a similar enterprise, will not do. Conditions may not always remain the same.—*Washburn v. Hubbard*, 6 Lansing, 11; *Masterson v. Mount Vernon*, 58 N. Y. 391; *Lewis v. Atlas Mut. Life Ins. Co.*, 61 Mo. 534; 2 Wait's Ac. & Def. 443.

It results from what is stated above, that the judgment in this case must be reversed on many of the rulings.

The complaint and amended complaint contain many averments of breach, and there are many demurrers thereto. Some of the breaches are insufficient. We will not notice all the imperfections, but will call attention to some of them. These, with the principles declared above, will, we trust, furnish a sufficient guide for another trial. The following are imperfections in the original complaint: The first breach should have averred some amount of sales. The second breach should have averred that, when the alleged other agent was sent to Georgia to make sales, plaintiff was still performing the duties of agent under the contract, or was prevented from doing so by the wrongful act of defendant. The third should have averred some amount of sales, for compliance with which defendant failed to furnish oil. Assignments numbered 3½, 4, 5, 6, 7 and 8, we need not specially comment on. The principles declared above will determine when, and to what extent, they need amendment. These remarks apply equally to amendments of the complaint, as shown in the record.

Extent of sales made by plaintiff was competent evidence, as tending to furnish a basis for fixing plaintiff's compensation for services he had rendered. It was not competent as affording a guide for estimating future or prospective profits. This was proper subject for a charge, explanatory of the extent of its admissibility.—1 Brick. Dig. 809, § 87; *Ib.* 810, § 98.

That part of the general charge which was excepted to, has a tendency to mislead. This will not reverse. Appellant should have asked an explanatory charge. The third charge given at the request of plaintiff should have been refused. In the charge given by the court of its own motion, the City

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Court erred, in the following language: "If the evidence shows you [the jury] that the defendant did give the plaintiff such authority [authority to sell on time], and that while plaintiff was exercising the same defendant did not withdraw it, but informed plaintiff he would be required to guarantee all such sales, such requirement, if it embarrassed plaintiff in his operations, and prevented him from making sales, was a breach of contract." We have shown above that the authority to sell on time was a mere order, which the company was authorized by the contract to give, or, at most, a mere license. The company was not only authorized to revoke it, but could modify it at its pleasure. It was not a contract. If it had been, neither party could have rescinded or modified it without the concurrence of the other. Each would have been equally bound by it, or neither was bound.—*Cin., Selma & Mobile Railway Co. v. Evans*, at present term.

No one will contend that, under this license, Barton was compelled to sell on time; or that, if he had refused to do so, it would have been a breach of his agreement. Not being bound himself, the company was not bound to continue the license any longer than it chose to grant it. It had authority to continue the license, to revoke it absolutely, or to modify it. When Barton was informed he would not be permitted to sell on time except on his own personal guaranty, he had a clear right to refuse to make credit sales on these terms. This order was no breach of contract on the company's part, and it conferred on Barton no right to treat the contract as broken by the company.

The sixth charge should not have been given, because it assumed as fact, without hypothesis, that Barton had kept, and was keeping his part of the contract, and that the company had been guilty of a breach on its part. The eighth charge is objectionable on the same ground.

Reversed and remanded.

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Statutory Real Action in nature of Ejectment, by Purchaser at Mortgage Sale against Mortgagor.

1. Who is proper party plaintiff; amendment by striking out parties. A statutory action in the nature of ejectment must be brought in the name of the person who holds the legal title; and if he is described in

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the summons and complaint as suing for the use of another person, these words may be struck out, by amendment (Code, § 3156), as surplusage.

2. *Plea of tender by mortgagor, to purchaser at mortgage sale.*—A plea of tender, not accompanied with the payment of the money to the clerk of the court, is demurrable (Code, § 2997); and this provision applies to a plea of tender interposed by the mortgagor in defense of an action by the purchaser at a sale under the mortgage, although it is declared by another statute (§ 2879) that the tender “has the effect to re-invest him with the title.”

3. *Estoppels; general principle governing.*—In modern times, the doctrine of estoppel has lost the odium once attached to it, and it is now regarded as an important and useful principle, having its origin in moral duty and public policy, intended for the promotion of common honesty and the prevention of fraud; the general principle being, that when a party has procured an advantage to himself, or has induced another person to act to his own prejudice, by the admission or assertion of anything as a fact, he shall not be allowed, in a subsequent suit founded on the same subject-matter, to contradict that admission or assertion.

4. *Estoppel as between landlord and tenant.*—When the tenant enters into the possession on the faith of his lease, or, being in possession, is permitted to remain on recognition of the landlord's title, he is estopped from setting up an outstanding title in defense of an action by his landlord during the continuance of his estate.

5. *Same; conclusiveness of judgment.*—Where the mortgagor, remaining in possession after a sale under the mortgage, and being sued by a sub-purchaser, denied his tenancy under the plaintiff, and claimed to hold under the original purchaser, and thereby (with other pleas) defeated that action; he can not defeat a subsequent action by the original purchaser, by pleading and proving that he held possession as the tenant of said sub-purchaser.

APPEAL from the Circuit Court of Wilcox.

Tried before the Hon. JOHN MOORE.

This action was brought by Albert A. Smith, against J. Decatur Caldwell, to recover the possession of a tract of land particularly described in the complaint, with damages for its detention; and was commenced on the 29th July, 1879. In the original summons and complaint the plaintiff was described as suing “for the use of John D. Alexander, Alexander C. Davidson, Frederick A. McNeill, and John T. Hollis;” but, after demurrer sustained to the complaint, the court allowed the summons and complaint to be amended, against the objection of the defendant, by striking out this averment, and leaving said Smith as sole plaintiff in his own right. Caldwell died pending the suit, and the action was thereupon revived against his administrator and his heirs at law, who appeared, and filed five pleas. The first plea was not guilty, and the fifth was the statute of limitations of ten years; and the cause was tried on issue joined on these two pleas. The other pleas, to which demurrers were sustained, were in these words:

2. “Defendants say, that the said lands sued for in this case were, to-wit, on the 14th December, 1868, under an alleged mortgage and power of sale alleged to have been made by said

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J. D. Caldwell to Patrick, Irwin & Co., sold by said John D. Alexander" (and the three other persons for whose use the suit was originally brought), "they claiming to be the assignees of said Patrick, Irwin & Co., and the right to sell, under an alleged power of sale made by said J. D. Caldwell, on the 24th September, 1868, to said Patrick, Irwin & Co.; that a sale of said lands was made, under said alleged power of sale, on the 14th December, 1868, and at said sale said lands were purchased by one Albert A. Smith, for the sum of \$3,000; that said J. D. Caldwell did, according to law, after said sale, deliver the possession of the said lands to the said purchaser; that on the 13th December, 1870, within two years after said sale, the said J. D. Caldwell tendered to the said Albert A. Smith the purchase-money, \$3,000, with ten per-cent. *per annum* thereon, and other lawful charges. And defendants aver that, by the said tender so made by said Caldwell, he, the said J. D. Caldwell, was re-invested with the title to said lands, and that these defendants are his heirs at law and the administrator of his estate." The third plea averred the sale, delivery of possession and tender, in the same words as the second, and then added: "And defendants aver that, by the said tender so made by the said Caldwell, he, the said J. D. Caldwell, was thereby invested with the right of possession to said lands, and was invested with the said right of possession at the time this suit was instituted; and that these defendants are his heirs," &c. The fourth plea averred "that, on the 14th December, 1870, the day after said tender was made, said J. D. Caldwell was then and there lawfully in the possession of said lands sued for in this action, claiming said lands adversely since said 14th December, 1870, against all the world; and that the said Caldwell, and these defendants since his death, have continuously remained in the adverse possession of said lands, up to the date of the filing of this plea, and still are in adverse possession thereof."

On the trial, as the bill of exceptions shows, the plaintiff offered in evidence the mortgage executed by said Caldwell to Patrick, Irwin & Co., which was dated November 5th, 1870, and conveyed the lands here sued for; and this mortgage was admitted as evidence by the court, against several objections on the part of the defendant going to the regularity and sufficiency of its execution and acknowledgement. This mortgage and the note which it was given to secure, were each transferred by said Patrick, Irwin & Co., by assignment dated March 13th, 1868, to said J. D. Alexander and others; and these assignments were admitted as evidence by the court, against the objections and exception of the defendant. The assignment of the note was thereon indorsed, and was in these words: "Pay the within, which is secured by mortgage, and we transfer the

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mortgage with this note, to J. D. Alexander, John T. Hollis, A. C. Davidson, and F. A. McNeill." The transfer of the mortgage was indorsed on a certified copy, the original not being at hand at the time, and was in these words: "We transfer this mortgage, with accompanying note described therein, to J. D. Alexander, John T. Hollis, A. C. Davidson, and F. A. McNeill." The mortgage contained no power of sale, but on the 24th September, 1868, said Caldwell executed to said Patrick, Irwin & Co. a written instrument under seal, which, after reciting the execution and consideration of the mortgage, and the fact that it contained no power of sale, proceeded thus: "Now, therefore, in consideration of the indulgence granted to me upon said debt by said Patrick, Irwin & Co., and in order to save trouble and expense of further legal proceedings in order to close said mortgage, and to effect a sale of the land under the same, I hereby consent that said Patrick, Irwin & Co., or their assignees, or legal representatives, may and shall have full and complete legal authority to close said mortgage by the sale of said lands," &c., specifying the notice to be given, "and apply the proceeds of said sale to the payment of said note therein described," &c. This instrument was offered in evidence by the plaintiff, and was admitted by the court, against the objections and exceptions of the defendant. Under the mortgage and this power of sale, the lands were sold on the 14th December, 1868, by said Alexander *et al.*, as the assignees of Patrick, Irwin & Co., and a deed was executed by them to said Albert A. Smith, the plaintiff in this action, as the purchaser at the sale. The defendant objected to the admission of this deed as evidence, and also to the proof of the advertisement of the sale, insisting that the advertisement and sale were not regularly made; and he reserved exceptions to the overruling of his several objections. This was the plaintiff's documentary title, and the decision of this court renders it unnecessary to state the objections urged by the defendant, and duly reserved by exception, to the different parts of it.

"The plaintiff offered in evidence a portion of the bill of exceptions reserved on a former trial in the case of John D. Alexander, Alex. C. Davidson, Fred. A. McNeill and John T. Hollis, as plaintiffs, against said J. D. Caldwell, as defendant, the same being a part of the testimony of said Caldwell on said trial, as follows: 'The plaintiffs then introduced the defendant as a witness, who testified, that the plaintiffs offered for sale the said lands sued for, as the assignees of Patrick, Irwin & Co., under the mortgage and power of sale aforesaid, at Camden, Alabama, on the 14th December, 1868; that one A. A. Smith became the purchaser at said sale, for the sum of \$3,000; and that he, said Caldwell, continued in the possession of said

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lands as the tenant of said Smith, and paid rents for said lands for the years 1869 and 1870, up to the date of said tender.' The plaintiff then introduced said F. A. McNeill as a witness, who testified, that he was present at said sale on the 14th December, 1868, and that said J. D. Caldwell was also present. The defendants then introduced one Savage as a witness, and stated to the court that they proposed to prove by said witness, under the general issue, the facts as to a tender set out in the second and third pleas;" which evidence the court excluded, on the plaintiff's objection, and the defendants excepted. The defendants offered in evidence, also, a conveyance of the lands to said J. D. Caldwell by Jno. F. Bailey, as assignee in bankruptcy of said Caldwell, which was dated April 21st, 1869, and all the proceedings in the matter of said Caldwell's bankruptcy, including his discharge as a bankrupt, which was dated December 6th, 1869; and they reserved exceptions to the several rulings of the court excluding each portion of this evidence. The defendants then offered in evidence a quit-claim deed for the lands, executed by plaintiff to said Alexander, Davidson, McNeill and Hollis, which was dated July 2d, 1872; but this deed, also, was excluded by the court, on the plaintiff's objection, and the defendants excepted.

"The defendants introduced said F. A. McNeill as a witness, who testified, that he did not know from whom said Caldwell rented said lands after said sale on the 14th December, 1868, but that he, as one of the parties interested, collected part of the rent for the years 1869 and 1870 from S. J. Cumming, who claimed to be acting as the agent of said Alexander, Davidson, Hollis and McNeill, in renting out said lands for said years. The defendants then introduced said S. J. Cumming as a witness, who testified that he, as the agent of said Alexander, Davidson, Hollis and McNeill, rented said lands to said Caldwell, for each of said years 1869 and 1870, and, after deducting his charges, paid over said rents to some of said parties named, or to some one for them; that he remembered paying part of said rents to said McNeill; and that said Caldwell refused to rent said lands for the year 1871, on the ground that, having made a tender to said Smith, of the purchase-money and interest, the title to the lands was thereby re-invested in himself. The plaintiff then introduced, in rebuttal, the original summons and complaint in the case of said Alexander, Davidson, Hollis and McNeill, as plaintiffs, against said J. D. Caldwell as defendant, together with the defendant's pleas in said action." The action was brought to recover the same lands now sued for, and was commenced on the 5th February, 1878. The defendant's pleas, as copied in the transcript, were—1st, not guilty; 2d, a special plea of tender; 3d, a suggestion of adverse possession and the

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erection of valuable improvements. The plea of tender averred the sale of the land on the 14th December, 1868, and the purchase by Albert A. Smith at that sale, and then proceeded: "that this defendant remained in possession of said lands after said sale as the tenant of the said Albert A. Smith, and paid him rent therefor, from the date of said sale to the 13th December, 1870, on which last mentioned day, within two years after said sale under said mortgage and power of sale, this defendant redeemed said land, by tendering on said 13th December, 1870, the said purchase-money with ten per-cent. *per annum* thereon, and all other lawful charges, to the said Albert A. Smith, the purchaser aforesaid; and defendant avers that, by the tender so made by him, he was re-invested with the title to said land."—See the report of that case, in 61 Ala. 543.

It was agreed that the damages, if the jury found for the plaintiff, should be assessed at \$850; and the above being all the evidence, the court charged the jury, at the request of the plaintiff, that they must find for the plaintiff, if they believed the evidence, and assess his damages at \$850. The defendants duly excepted to this charge, and they now assign it as error, together with the allowance of the amendment to the summons and complaint, the judgment on the demurrers to the special pleas, and the several rulings on evidence to which exceptions were reserved by them.

R. GAILLARD, and S. J. CUMMING, for appellants.—(1.) The suit was not properly brought, and no recovery could be had under the complaint. Alexander *et al.*, for whose use the suit was brought, "must be considered the sole party on the record." Code, § 2891. Therefore, when their names were struck out, there was no plaintiff of record; and allowing the suit to proceed in the name of Smith as the real plaintiff, was the substitution of an entirely new party. This can not be done by amendment.—*Teer v. Sanford*, 1 Ala. 525; *McBrayer v. Cariker*, 64 Ala. 50; *Dowling v. Blackman*, 70 Ala. 303; *Long v. Patterson*, 51 Ala. 408; *Johnson v. Martin*, 54 Ala. 273; *Crimm v. Crawford*, 29 Ala. 623; *Laird v. Moore*, 27 Ala. 328; *Friend v. Oliver*, 27 Ala. 532; *Anderson v. Robertson*, 32 Miss. 241; *McKay v. Broad*, 70 Ala. 377; *Skinner v. Bedell*, 32 Ala. 44; *White v. Nance*, 16 Ala. 345. A similar difficulty, in actions for the recovery of land, was found to exist in New York, and was remedied by statute.—*Hamilton v. Wright*, 37 N. Y. 506; *Livingston v. Proseus*, 2 Hill, 529; Tyler on Ejectment, 937–8. (2.) The pleas of tender were each good and sufficient, although not accompanied with the payment of the money into court. The statute requiring that a plea of tender must be accompanied with the payment of the

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money into court (Code, § 2997), it is submitted, applies only to actions on contracts, a tender being in the nature of performance; and though the plaintiff may maintain the action, his debt not being extinguished, he recovers neither interest nor costs. But the statute for the redemption of real estate, under which this tender was made (Code, § 2879), gives the same effect to a tender as to a payment, declaring that "such payment or tender has the effect to re-invest him with the title;" and it gives an action for the recovery of possession, if the tender is refused.—*Trimble v. Williamson*, 49 Ala. 525; *Johnson v. Nabring*, 50 Ala. 392; *Morris v. Beebe & Henshaw*, 54 Ala. 307; *Carlin v. Jones*, 55 Ala. 630; *Searcy v. Oates*, 68 Ala. 111; *Edwards v. Farmers' Insurance Co.*, 21 Wendell, 488; s. c., 26 Wendell, 557; *Kortright v. Cady*, 21 N. Y. 343; 5 Rob. Prac. 947. (3.) The defendant should have been allowed to prove, under the general issue, the facts set up in the pleas of tender. In ejectment, or the corresponding statutory action, the plaintiff must recover on the strength of his own title—must show a paramount legal title, or right of possession as against the defendant, both at the commencement of the suit, and at the time of the trial; and any evidence is admissible under the general issue, which tends to disprove his right to recover.—Tyler on Ejectment, 75-7, 87, 176; *Slaughter v. McBryde*, 69 Ala. 510; *Scranton v. Ballard*, 64 Ala. 402; *Heflin v. Bingham*, 56 Ala. 566; *Baucum v. George*, 65 Ala. 259; 5 T. R. 110; 1 East, 246; Chitty's Pl. 172, 209; 2 Greenl. Ev. §§ 303-30; 7 Cowen, 35; 10 Wendell, 112; 11 Johns. 132. (4.) The extract from the bill of exceptions in the former case of *Alexander et al. v. Caldwell*, was not competent evidence against the defendant here.—Herman on Estoppel, § 322; *S. & N. Railroad Co. v. Wood*, 72 Ala. 451. (5.) At law, an estoppel resting in parol can have no effect on the title to land.—Cases cited in 1 Brick. Dig. 796, § 7; *Lehman, Durr & Co. v. Shook*, 69 Ala. 486. Mere silence, or an omission to assert a right, will not operate an estoppel in any case, when resulting from ignorance.—*Allen v. Kellam*, 69 Ala. 442; *Owen v. Slatter*, 26 Ala. 547; *Sloan v. Frothingham*, 65 Ala. 593; *Colbert v. Daniel*, 32 Ala. 314; *Walls v. Grigsby*, 42 Ala. 473. (6.) A tenant may show that his landlord's title has expired by operation of law, and that he has acquired an independent title outside of his tenancy.—*Randolph v. Carlton*, 8 Ala. 606; *English v. Key*, 39 Ala. 114; *Otis v. McMillan*, 70 Ala. 47; *Jackson v. Davis*, 5 Cowen, 123; Tyler on Ejectment, 560; Taylor's Land. & Tenant, 597; Herman on Estoppel, § 349; 2 Greenl. Ev. § 305. The defendant did not enter originally under either Smith or Alexander; and though he paid rent for two years, up to the time of the tender,

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under the supposition that the sale under the mortgage and power was valid and regular, he has been holding in adverse and independent right ever since the tender ; and he should not now be estopped from showing, as he did in this case by the objections urged to each part of the plaintiff's chain of title, that no title ever passed by that sale, and that he paid rent in ignorance and misapprehension of his own rights.—*Amer. Law Review*, October, 1871, p. 1 ; *Tewksberry v. McGeaff*, 33 Cal. 237 ; *Franklin v. Merida*, 35 Cal. 558 ; *Ingraham v. Baldwin*, 9 N. Y. 45 ; *Jackson v. Spear*, 7 Wendell, 401 ; *Swift v. Dean*, 11 Vermont, 323 ; *Shultz v. Elliott*, 11 Humph. 183 ; *Stokes v. McKibben*, 15 Penn. St. 267 ; *Emory v. Harrison*, 15 Penn. St. 315 ; *Shelton v. Carroll*, 16 Ala. 148 ; *Pearce v. Nix*, 34 Ala. 183 ; *Jackson v. Leake*, 12 Wendell, 105. (7.) The judgment rendered in the former suit can not operate as a bar or estoppel in this case. The judgment was one of nonsuit, and the only point actually decided was, that the plaintiffs there could not recover.—*Freeman on Judgments*, § 257-8, 252, 261 ; *Jones v. McCall*, 72 Ala. 368. Several pleas were filed in that case, and the record does not show on what issue the decision was made.

BROOKS & ROY, *contra*, cited *Alexander v. Caldwell*, 61 Ala. 543 ; *Dane v. Glennon*, 72 Ala. 160 ; *Hill v. Huckabee*, 70 Ala. 183 ; *Norwood v. Kirby*, 70 Ala. 397 ; *Herman on Estoppel*, § 165 ; *Trustees v. Williams*, 9 Wendell, 147 ; *Martin v. Ives*, 17 Serg. & R. 364 ; *Vanderver v. Wilson*, 73 Ala. 389.

SOMERVILLE, J.—1. There is no error in the action of the court allowing the plaintiff to amend his complaint, by striking out the beneficiaries for whose use the suit purported to be brought. We so ruled in *Dane v. Glennon*, 72 Ala. 160, where we held, that sections 2890-91 of the Code (1876) had no application to suits in ejectment.

2. The demurrers to the second and third pleas were properly sustained, these pleas being defective for failure to aver a delivery of the money to the clerk of the court, which money is alleged to have been tendered to the plaintiff for the redemption of the lands in controversy. We refuse to depart from the ruling on this point made in the case of *Alexander v. Caldwell*, 61 Ala. 543.

3. It is insisted that the appellant in this case is estopped from denying that his intestate, J. Decatur Caldwell, was the tenant of the plaintiff, holding possession of the lands sued for, under the plaintiff as a landlord. The basis of this alleged estoppel is, that, in an action of ejectment brought by one Alexander for these same lands, in July, 1879, Caldwell set up

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the defense that he was not the tenant of Alexander, but of Smith, and that, by means of this representation, supported by his own oath in evidence, he defeated said action, or derived to himself some advantage which may have operated to obtain a verdict in his favor under the issues made in the cause, and thereby induced the plaintiff to bring the present action. For this reason, it is contended, Caldwell's personal representative can not be permitted to defeat this suit now brought by Smith, by asserting that he was Alexander's tenant, and not Smith, the plaintiff's. In other words, he defended, and may have defeated Alexander's suit, by asserting that he was Smith's tenant; now he can not defeat Smith's suit, by asserting that he was Alexander's tenant—the evidence showing that he was either the one or the other.

It was anciently said, that estoppels were odious, because they *stopped* or closed one's mouth from alleging the truth. Co. Litt. 352 *a*. But, in modern times, the doctrine has certainly lost its odium, and may now be regarded as one of the "most important, useful, and just agencies of the law."—Bigelow on Estop. 44. It has its origin in moral duty and public policy; and its chief purpose is the promotion of common honesty, and the prevention of fraud. Where a fact has been asserted, or an admission made, through which an advantage has been derived from another, or upon the faith of which another has been induced to act to his prejudice, so that a denial of such assertion or admission would be a breach of good faith, the law precludes the party from repudiating such representation, or afterwards denying the truth of such admission. 1 Greenl. Ev. (14th Ed.) §§ 27, 207. So, a party who either obtains or defeats a judgment, by pleading or representing anything in one aspect, is generally held to be estopped from giving the same thing another aspect, in a suit founded upon the same subject-matter.—Herman on Estop. § 165. It was accordingly held by us, in *Hill v. Huckabee*, 70 Ala. 183, where a defendant had defeated a former suit for the same cause of action, on the ground that the plaintiff was not administratrix, by reason of her removal from such office, that, upon a second suit brought, the defendant would be estopped from denying the existence of such vacancy in the administration, and, as a consequence, from denying that the plaintiff's appointment afterwards made was regular and valid.

4. The existence of the relation of landlord and tenant, as between the plaintiff and the defendant in an action of ejectment, is a fact of vital and controlling importance. The rule is, that the tenant is estopped from disputing his landlord's title, so long as he continues in possession of the demised premises. After taking possession on the faith of his lease, or

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being permitted to remain in such possession, in recognition of the landlord's title, the tenant is precluded from setting up an outstanding title with the view of defeating that of the landlord.—*Norwood v. Kirby*, 70 Ala. 397; *Houston v. Farris*, 71 Ala. 570; 1 Greenl. Ev. § 207. The issue made on the first trial, involving the relationship of the parties, was one in which the particular defense made was sufficient to defeat the action. It does not matter that other defenses were also made. The court will not speculate, in such case, as to which defense actually controlled the verdict of the jury. Each becomes *res adjudicata*. It is sufficient that an issue was made, which involved the determination of the fact presented for defense, and the truth or falsity of which the jury may have found under the pleadings.—Freeman on Judg. §§ 276 a, 272.

The evidence is conclusive that Caldwell was the tenant either of Alexander, or of Smith. Having possibly defeated Alexander's suit by proving that he was Smith's tenant, he is, in our opinion, now estopped from attempting to defeat Smith's suit, for the same subject-matter, by proving that he was Alexander's tenant. The law of estoppel is but a branch of the law of evidence, and such evidence is precluded by every consideration of good faith, sound morality, and public policy.

The evidence in the present case does not tend to prove that the landlord's title had expired, or been extinguished, so as to bring it within the principle settled in *Houston v. Farris*, 71 Ala. 570; s. c., 74 Ala. 162. The tender made by Caldwell to Smith, being insufficient, did not operate to affect Smith's title.—*Alexander v. Caldwell*, 61 Ala. 543.

Under the foregoing principles, the defendant could take no advantage of any of the alleged defects of plaintiff's title, and the other rulings of the court complained of, if errors at all, are errors without injury.

The judgment should, in our opinion, be affirmed.

STONE, C. J.—In *Alexander v. Caldwell*, 61 Ala. 543, the questions considered were raised by the second plea, which, after stating that the lands had been sold under the power of sale attached to Caldwell's mortgage, at which sale Smith, the present plaintiff, became the purchaser, proceeded as follows: "That this defendant (Caldwell) remained in possession of said lands after said sale, as tenant of said Smith, and paid him rent therefor, from the date of said sale, to the 13th day of December, 1870; on which last mentioned day, and within two years after said sale under said mortgage and power of sale, the defendant redeemed said lands, by tendering on the 13th day of December, 1870, the purchase-money with ten per-cent. *per annum* thereon, and all other lawful charges, to said Albert

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A. Smith, the purchaser as aforesaid; and defendant avers that, by said tender as aforesaid by him, he was reinvested with the title to said lands. And said defendant suggests that he has, for three years next before the commencement of this suit, had adverse possession of said lands, and has made valuable and permanent improvements thereon, to the value of one thousand dollars."

Plaintiff moved to reject this plea, as insufficient and frivolous, which motion the court overruled. Plaintiff then demurred to the plea, and the court overruled the demurrer. Issue was then taken upon it, and there was a verdict and judgment for the defendant. On this issue, Caldwell himself was examined as a witness, and testified to every material averment of his plea, including that of his retaining and holding possession under Smith, up to the time of his attempted disseisin of his landlord by tender.

On appeal to this court, we held the plea fatally defective as a plea of tender, and that the legal title, resting in Smith, had not been thereby divested. The effect of our ruling was, that the legal title remained in Smith, so far as he and Caldwell were concerned. Caldwell, being in under Smith, could not, without either abandoning the possession, or by showing that plaintiff's title had failed by agencies other than his own, be heard to gainsay Smith's right of recovery, unless he could show his tender was sufficient. Such are the disabilities under which a tenant rests in regard to his landlord.—*Houston v. Farris*, 71 Ala. 570; *Norwood v. Kirby*, 70 Ala. 397; *Randolph v. Carlton*, 8 Ala. 606. We ruled, however, in that case, that Caldwell was not estopped from asserting adverse possession against Alexander, the plaintiff in that suit; and so we held, that while the defense, as a plea of tender, was wholly insufficient, as a defense of adverse holding it was sufficient, and did defeat the operation of the conveyance under which Alexander claimed. Under the testimony then given—Caldwell's testimony—we would have reversed and remanded the cause, with such ruling as that, if Smith had been the plaintiff, his recovery would have been inevitable. Alexander, however, being the plaintiff in that suit, and his right to recover being denied, because of Caldwell's self-testified defense that he held adversely when Alexander's title accrued, we declined to remand the cause for another trial. We declined to remand, because, as the pleadings and proof then appeared, Alexander never could recover, although Caldwell's title was invalid.

If it had appeared on that trial, as it is attempted to be shown in this, that Caldwell had remained in possession as Alexander's tenant, we would have reversed and remanded the cause, with such directions that there must have been a judgment for

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plaintiff. The question, in its last analysis, is then reduced to this: Pleading and proof of tenancy taken under Smith, defeats Alexander's action; in this, Smith's suit, it is sought to defeat the plaintiff by proving that Caldwell's tenancy was taken under Alexander. On the strength of Caldwell's testimony on the first trial, he obtained a valuable benefit in the defeat of Alexander's suit. It is now attempted, by disproving what was then proved, to secure to Caldwell's estate another benefit, in defeating Smith's suit. One of these lines of defense must, of necessity, be untrue. We may concede it was the first. Yet, under its maintenance as true, Caldwell gained that suit. He will not be allowed to deny it, as a means of defeating this.—*Hill v. Huckabee*, 70 Ala. 183.

I concur in the judgment of affirmance in this case.

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Ancillary Garnishment; Judgment Discharging Garnishee.

1. *Garnishment; what demands may be reached by.*—A debt or demand, for which the owner can not maintain an action of debt or *indebitatus assumpsit* in his own name, can not be reached and condemned by garnishment at the suit of his creditors.

2. *Check on bank or debtor; not assignment of funds in hands of drawee.*—A check, drawn and delivered to the person to whose order it is payable, does not, without acceptance by the drawee, operate as an assignment of the sum in his hands for which it is given; it may be revoked by the drawer, at any time before acceptance, and is revoked by his death; and there being no privity, express or implied, between the payee and the drawee, the former can maintain no action on it against the latter.

3. *Indorsement of check "for collection", or "for deposit."*—When a bank receives from a customer a check on another bank, for the special purpose of collection, the title does not pass by the special indorsement for that purpose; nor does the receiving bank owe the amount, until the check is collected. But, where the customer has a deposit account with the bankers, on which he is accustomed to deposit checks payable to himself, which are entered on his pass-book, and to draw against such deposits; an indorsement of the words "*For deposit*," on a check so deposited, "is, in the absence of a different understanding, presumptive of more than a mere agency or authority to collect"—it is a request and direction to deposit the sum to the credit of the customer, and gives to the bankers authority, not only to collect, but to use the check in such manner as, in their judgment and discretion, having reference to the condition and necessities of their business, may make it most available to their protection; and they may have it certified by the bank on which it is drawn.

4. *Certifying bank check.*—A certified check has a distinctive character as a species of commercial paper, the certification constituting a new

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contract between the holder and the certifying bank; the funds of the drawer are, in legal contemplation, withdrawn from his credit, and appropriated to the payment of the check, and the bank becomes the debtor of the holder as for money had and received.

5. *Same; what demands may be reached by garnishment.*—Where the defendant has a right of election, on account of a tort committed, either to sue for the tort, or, waiving the tort, to sue for money had and received, the relation of debtor and creditor does not exist, until he elects to sue for the money; and his creditors can not defeat his election, by garnishment against the wrong-doer. But this principle does not apply, where the garnishees, having received a check from the defendant, with authority to collect for deposit and use, have had the check certified by the bank on which it is drawn, before the service of the garnishment: being authorized to have it certified, and the relation of the parties being thereby changed, they are liable to the defendant for the amount of the check, as for money had and received, and that liability may be reached by garnishment.

6. *Summons of transferee, or adverse claimant.*—When the answer of a garnishee admits an indebtedness or liability which is subject to garnishment, but discloses the fact that the demand is claimed by a third person, the statute requires that the adverse claimant shall be notified to appear (Code, § 3302); and it is error to discharge the garnishee, although his answer is not contested.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WM. E. CLARKE.

The appellant in this case, the National Commercial Bank of Mobile, commenced suit by summons and complaint, on the 5th February, 1884, against Adolph Proskauer; and at the same time sued out an ancillary garnishment, which was served, on the same day, on Thos. P. Miller & Co., bankers, doing business in the city of Mobile, as the debtors of said Proskauer. The action was founded on several promissory notes, which were executed in the name of "A Proskauer & Co.", and which aggregated over \$23,000; all of said notes being dated June 23d, 1883, and payable January 1st, 1884, with interest from different antecedent days, commencing March 4th, 1882. The defendant appeared, and pleaded; and issue being joined, a judgment was rendered for the plaintiff on the 5th June, 1884. The garnishees also appeared, and filed a written answer; and afterwards, on motion of plaintiffs, they were examined orally in court, in answer to questions propounded by the parties, the examination being taken down in writing. In the answers thus made, written and oral, they stated the following facts:

At the time of the service of the garnishment, at ten minutes past two o'clock p. m., February 5th, 1884, the sum of \$330.60 was standing on the books of said garnishees to the credit of "A Proskauer & Co., agent of B. Newgass & Co., Liverpool, England;" but they did not know whether it belonged to A. Proskauer & Co., or to B. Newgass & Co., though said Proskauer notified them, after the service of the garnishment, that it belonged to said Newgass & Co. They also had in their

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possession, at the time of the service of the garnishment, two checks which Proskauer had deposited with them that day, each of which was for \$8,000, and was drawn by "*H. W. Leinkauf, pro Wm. H. Leinkauf*, payable *to the order of A. Proskauer & Co., agents.*" One of these checks was drawn on the Mobile Savings Bank, and the other on the People's Savings Bank; each was dated February 5th, 1884, and on each was an indorsement in these words: "*For deposit, Proskauer & Co., agents.*" Each of these checks was indorsed by the garnishees, "*Indorsements guaranteed,*" and presented to the bank on which it was drawn, for certification, before the service of the garnishment; and the check drawn on the People's Savings Bank was certified by that bank, by an indorsement in its name by its teller, in these words; "*Good for eight thousand dollars.*" Afterwards, on the same day—"after banking hours," as the written answer stated, "and after said checks are presented to said banks respectively for certification, and after the service of said garnishment"—written notices were served on the garnishees by said Leinkauf, the drawer of the checks, and by "*A. Proskauer & Co., agents,*" forbidding the collection of the checks. The notice served by Leinkauf was dated February 5th, 1884, addressed to the garnishees, and in these words; "You are hereby notified, that a check this day drawn by me on the People's Savings Bank, No. 3570, payable to A. Proskauer & Co., agents, and certified by said bank, was obtained from me upon certain conditions which have not been performed, and that the same now remains my property. I hereby forbid you to present said check for payment, or to collect or receive any money on the same; and I demand of you the delivery of said check to me." The notice served by "*A. Proskauer & Co., ag'ts,*" was also dated February 5th, 1884, addressed to the garnishees, and in these words: "The certified check of this date for \$8,000, No. 3570, drawn by W. H. Leinkauf on the People's Savings Bank, payable to our order, having been indorsed to you for deposit only, we are advised that the legal title thereto has not passed from us, and that you have no authority to collect the same, except as our agent. We now hereby revoke your authority to collect said draft, and hereby instruct you not to present said draft for payment, and not to collect anything on account thereof."

As to the course of business between the garnishees and said A. Proskauer, and the manner in which their account with him was opened and kept on their books, there were material discrepancies between the written and the oral answers of the garnishees; but these discrepancies are only material to the question, which is not now presented, whether the checks be-

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longed to Newgass & Co., or to Proskaner individually, who did business under the name of A. Proskaner & Co.

At the June term, 1884, after the garnishees had answered orally, they paid into court the amount admitted to be in their hands, \$330.60, and asked to be discharged on their answer; and at the same term, the plaintiffs submitted a motion for a notice to B. Newgass & Co., and to Wm. H. Leinkauf, requiring each of them to appear and propound their respective interests in the moneys in the hands of the garnishees arising from the checks. These motions being submitted together, the court rendered judgment discharging the garnishees, ordering notice to B. Newgass & Co., as to the \$330.60 in the hands of the garnishees, but refusing to order notice to them as to the check, and refusing to order notice to Leinkauf. The plaintiffs duly excepted to the judgment discharging the garnishees, and to the overruling and refusal of their motion for notices to Newgass & Co. and Leinkauf; and they now assign these rulings as error.

J. L. & G. L. SMITH, for appellant.—(1.) When the garnishees presented the check to the bank, and the bank certified it as good, the legal effect of the transaction was, that they collected the money for Proskaner, or Proskaner & Co., and re-deposited it with the bank to their own credit; that they thereby became indebted to Proskaner, or Proskaner & Co., for the amount of the check, as for money had and received; that the amount ceased to stand on the books of the bank to the credit of the drawer, but was charged against him; and that his liability as drawer of the check, and the liability of Proskaner & Co. as indorsers, was discharged.—*Willets v. Phoenix Bank*, 2 Duer, 121; *Merchants' Bank v. State Bank*, 10 Wallace, 647; *Cooke v. National Bank*, 52 N. Y. 96; *Meads v. Merchants' Bank*, 25 N. Y. 148; *First Nat. Bank v. Leach*, 52 N. Y. 350; *Pratt v. Foote*, 9 N. Y. 468; *Bullard v. Randall*, 1 Gray, 607; *Girard Bank v. Penn Township*, 39 Penn. St. 92; 4 Duer, 219; 45 N. Y. 736; *Foster v. Bank of London*, 3 Foster & F. 214; *Smith v. Br. Bank*, 7 Ala. 880; Morse on Banks, 274, 310, 538, 2d ed.; 2 Dan. Neg. Instr. § 1601; Byles on Bills, by Sharswood, 39, 6th Amer. ed.; *Robson v. Bennett*, 2 Taunt. 388. (2.) The notices to the garnishees not to present or collect the check came too late after the service of the garnishment, which amounted to a sequestration of the fund in their hands, and no subsequent act or device of the parties can defeat the lien thereby acquired. Code, § 3280; *Dore v. Dawson*, 6 Ala. 712; *Warfield v. Campbell*, 38 Ala. 531; Morse on Banks, 304, 310, 320; Drake on Attachments, § 453, and cases cited; 1 Dan. Neg. Inst. § 493;

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2 *Id.* 1608. (3.) If the money, when attached, belonged to Proskauer, the plaintiffs were entitled to condemn it in the hands of the garnishees; and if Newgass & Co. had any interest in it, notice should have been issued to them as prayed, in order that their claim might be contested by plaintiffs.

R. H. CLARKE, and OVERALL & BESTOR, *contra*.—(1.) As to the \$330.60 paid into court by the garnishees, there can be no doubt of their right to be discharged, without regard to the ownership of the money.—*Gas Light Co. v. Merrick & Sons*, 61 Ala. 534; *Henderson v. Gold Life Insurance Co.*, 72 Ala. 32. If, then, they are to be kept in court, it can only be on account of the two checks, which they still hold. But they received these checks “for deposit” only, and have never collected them. The title never passed to them, and their authority to present or collect has been revoked.—Morse on Banks, 385-6, 536, 2d ed.; 2 Danl. Neg. Inst. §§ 1590-91. (2.) The checks are mere *choses in action*, and are not the subject of garnishment. They are not “effects of the defendant,” for which a money judgment may be rendered; nor are they “chattels,” which they may be ordered to deliver up to the sheriff for sale.—*Jones v. Norris*, 3 Ala. 526; *Marston v. Carr*, 16 Ala. 328; *Pearce v. Shorter*, 50 Ala. 318; *Jones v. Crews*, 64 Ala. 368; *Toomer v. Randolph*, 60 Ala. 356; *Henderson v. Gold Life Insurance Co.*, 72 Ala. 32; *Knight v. Bowley*, 117 Mass. 551; Drake on Attachments, 481; *Id.*, App. 665-8, 676-7, 681-3; *Mann v. Buford*, 3 Ala. 312; *Randolph v. Little*, 62 Ala. 396.

CLOPTON, J.—There being no contention as to the check on the Mobile Savings Bank, our consideration will be confined to the relation between the garnishees and the defendant, arising from the facts in respect to the check on the People's Savings Bank, which was certified by the bank. It is conceded, that by process of garnishment, which is a proceeding of statutory creation, no debt or demand can be condemned to the plaintiff's claim, for the recovery of which the defendant can not maintain, in his own name, an action of debt, or *indebitatus assumpsit*. The question decisive of the case is, was the amount of the check, at the time of the service of the garnishment, a legal demand due by the garnishees to the defendant, which he could enforce in his own name in an action at law?

2. The check, although drawn and delivered to the payee, payable to his order, did not operate, without acceptance by the drawee, as an assignment of the sum for which it was given, though the drawer may have had funds in the possession of the drawee, of an equal or larger amount. There being no privity,

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express or implied, the holder of a check, in its original form, can bring no suit on the check against the drawee; even if it be conceded that he may maintain an action for any *special* injury, by reason of the omission of the drawee to perform a legal duty. In case of non-payment, the recourse of the holder is against the drawer, and the indorser, if any. The drawer alone can bring suit to recover the funds against which the check was drawn; and, ordinarily, he only can maintain an action for a failure to pay on presentment. He may revoke the check, and countermand its payment before acceptance; and if unaccepted, his death operates a revocation.

3. The reception from customers of checks on other banks is of frequent and daily occurrence in the business of banking, practiced because of its convenience. In such case, an indorsement of the check, for the special purpose of collection, is not an indorsement *animo indorsandi*, and does not pass the title of the payee. In the absence of a special agreement, when a check is deposited, it is taken, generally, for collection, by the bank as the agent of the depositor, and the bank does not owe the amount, until its collection is accomplished. It may be, that if it is passed to the credit of the depositor, and mingled with the general funds of the bank, it is, *prima facie*, a payment on deposit; but the bank may permit, as matter of favor and convenience, checks to be drawn against it before payment; the depositor, in the event of non-payment, being responsible for the sums drawn;—not by reason of his indorsement, the check not having ceased to be his property, but for money paid. If, therefore, the check had been deposited with the garnishees, for collection, and for no other special purpose, it is manifest that, so long as it remained uncollected, and in its original form, the amount could not be condemned by process of garnishment.

In what respects, and to what extent, was the relation changed, by the particular indorsement of the check, and its subsequent certification?

The defendant, in the name of "A. Proskauer & Co., agents," opened, in January, 1883, a deposit account with the garnishees, who were bankers. On this account the defendant deposited checks payable to "A. Proskauer & Co., agents," which were entered in the pass-book, and drew checks, in the same name, "on funds so deposited." The check in question was indorsed: "*For deposit, A. Proskauer & Co., Agents.*" The import and effect of such indorsement must be considered in the light of the attendant circumstances, and of the previous dealings between the parties. Where a depositor has for some time previously kept a deposit account with a banker, on which he was accustomed to deposit checks payable to him, entries of

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which were made in his pass-book, and to draw against such deposits, such an indorsement, in the absence of a different understanding, is presumptive of more than a mere agency or authority to collect. The special purposes for which an indorsement for deposit is made, under such circumstances, may be readily inferred. It was a request and direction to the garnishees to deposit the sum to the credit of the defendant, and conferred on them, not only authority to collect, but also authority to put the check in such form, and use it in such manner, as in their judgment and discretion, having reference to the condition and necessities of their business, would make it most available to their protection. The effect of the indorsement, for the consummation of this purpose, is to vest the garnishees with the title to, and control of the check. If, in such case, the check is not paid, the banker depends for safety and indemnity on the liability of the drawer, and the security of the indorsement.

4. Although a check does not call for acceptance, and the holder can present it only for payment, the certification of checks is a means in constant and extensive use in the business of banking, and its effects and consequences are regulated by the law-merchant. A certified check has a distinctive character, as a species of commercial paper, and performs important functions in banking and commercial business. The certification constitutes a new and distinct contract between the holder and certifying bank, which becomes the debtor of, and only liable to the holder. The funds of the drawer have, in legal contemplation, been withdrawn from his credit, and appropriated to the payment of the check. He and the indorser, if any, are released from all further liability; as to them, the check is paid.

In *Merchants' Bank v. State Bank*, 10 Wall. 604, it is said:

"By the law-merchant of this country, the certificate of a bank that a check is good is equivalent to acceptance. It implies that the check is drawn upon sufficient funds in the hands of the drawee, that they have been set apart to its satisfaction, and that they shall be so applied whenever the check is presented for payment. It is an understanding that the check is good then, and shall continue good; and this agreement is as binding on the bank, as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume. The object of certifying a check, as regards both parties, is to enable the holder to use it as money. The transferee takes it with the same readiness and sense of security that he would take the notes of the bank. It is available also to him for all the purposes of money. Thus it continues to perform its important functions, until in the course of

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business it goes back to the bank for redemption, and is extinguished by payment."

In *Willetts v. Phoenix Bank*, 2 Duer, 121, Chief-Justice OAKLEY said: "When the business of the bank is properly conducted, it is the duty of the officer certifying the check to cause it to be immediately charged, as paid, in the account of the drawer; and when this is done, the sum thus charged will remain as a deposit in the bank, to the credit of the check, and be forever withdrawn from the control of the maker, except as a holder of the check. Such a deposit stands upon exactly the same ground as every other." And STRONG, J., said: "Checks on a bank, marked 'good,' are to be regarded as evidence of deposit to the credit of the holder."—*Girard Bank v. Bank of Penn Town.*, 39 Penn. St. 92. If the check is certified to be good, "in contemplation and by operation of law, it is the same as if the funds had been actually paid out by the bank to the holder, by him deposited to his own credit, and a certificate of deposit issued to him therefor."—*Dan. on Neg. Inst.* § 1603; *Morse on Bank.*, 307-315; *First Nat. Bank v. Leach*, 52 N. Y. 350. When the check was certified, it ceased to possess the character, or to perform the functions, of a check, and represented so much money on deposit, payable to the holder on demand. The check became a basis of credit—an easy mode of passing money from hand to hand, and answered the purposes of money. The garnishees, by accepting a certification of the check, made it their own, and the relation of debtor and creditor was created between them and the defendant.

5. The rule, that where a defendant has the election to sue for a tort committed, or to waive the tort and to sue for the money received by the *tort-feasor*, the relation of debtor and creditor does not exist until the defendant elects to sue for the money, and that his creditors can not defeat his election by bringing process of garnishment, does not apply. The garnishees committed no wrong, or tort, of which the defendant can complain. They had a legal right to accept a certification of the check, and leave the money on deposit with the People's Savings Bank, instead of transferring it to their own vault. Certification of the check was within the authority vested in the garnishees by its deposit and indorsement, and is a mode, authorized by the law, by which it could be made available to them. The defendant obtained his purpose—a deposit with the garnishees to the amount of the check, against which he was entitled to draw—not by the wrongful and unauthorized act of the garnishees, but in pursuance of his request, as evidenced by his deposit and indorsement of the check. It was not wrongfully taken from his possession, nor was it converted

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by the garnishees to their own use, other than for the purpose contemplated and intended by the parties. The defendant has no right of action against them, as for a tort, on account of the certification of the check. Its certification was a payment as between the defendant and the garnishees, and thereafter they were bound to pay his checks in money, and were answerable to him for money had and received.

The garnishment operated as a lien, from the time of service, on any money or effects of the debtor in the possession of the garnishee; and by no act of the debtor, or of the garnishee, or of both, can the lien be defeated.—*Warfield v. Campbell*, 38 Ala. 527; *Dore v. Dawson*, 6 Ala. 712. While the check is, ordinarily, executory and revocable, and the drawer may countermand its payment; when the bank has certified the check, and thereby comes under obligation to the holder to pay it on presentment, the power to revoke ceases, as effectually as if actual payment had been made. The drawer's authority over the funds, on which it is drawn, terminates *pro tanto*. The same effect is produced when the law, by proper legal process, intervenes, and attaches or sequesters the fund.—*Morse on Bank.*, 305. The notices, by which the drawer forbade the garnishees to collect the check, and the defendant revoked their authority to present it for payment, having been given after the certification of the check, and after the service of the garnishment, were ineffectual to change the rights of the plaintiff, or to displace any lien acquired by the legal process.

By what we have said we have not intended to intimate any opinion as to the validity of the claim of Newgass & Co., or of Leinkauf. These questions have not yet arisen. All we decide is, that, on the facts set out in the answer, if no adverse claim were interposed, the plaintiff is entitled to judgment against the garnishees; but, it appearing there are adverse claimants, notices should be issued to them, under the statute, to propound their claims, and contest the plaintiff's right to the fund.

Reversed and remanded.

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Bill in Equity to enforce Covenant running with Land.

1. *Appeal; when returnable.*—When an appeal to this court is taken during term time, it may be made returnable to the first Tuesday in any month during the term (Code, § 3925); but the statute is not mandatory, and if the appeal is not so made returnable, or if it is sued out in vaca-

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tion, it is returnable, by operation of law, to the next regular term of the court.

2. *Affirmance on certificate; failure to file transcript.*—If the transcript is not filed during the term to which the appeal is taken, the appellee may have an affirmance on certificate; but, if he fails to ask this, and nothing is done with the cause during that term, it passes over to the next term, and a motion to dismiss then comes too late.

3. *Conveyance to married woman, "to her only proper use and behoof."* A conveyance of lands to a married woman, "to her only proper use and behoof," excludes the marital rights of her husband, and creates in her an equitable estate, as distinguished from a statutory estate.

4. *Variance between allegations and proof.*—Where the bill alleges that the complainants, married women, own the lands in controversy, or their respective interests therein, "as their separate estate under the married women's law of Alabama," while the evidence shows that their interests are held under a conveyance which creates an equitable estate, the variance is fatal.

5. *Waiver of objections to evidence.*—Objections to evidence, not raised in the court below, will be considered as waived, and will not be noticed by this court on appeal.

6. *Admission as to notice by purchaser.*—When lands are subject to an easement or restricted use under a conveyance from a remote vendor, a sub-purchaser who admits in his answer that, before his purchase, "he was informed of the existence of some such obligation," is chargeable with notice of all facts relating to the nature, character and extent of the obligation or restriction, which he might have ascertained by due inquiry from the persons claiming the benefit of it.

7. *Conveyance of lands with restriction as to use.*—The owner of lands, in making a sale and conveyance of them, may reserve and retain a servitude or easement in them, or impose restrictions upon their use by the purchaser or his assigns, deemed injurious to the use or value of the vendor's adjoining lands; and when such restrictions are not in general restraint of trade, nor otherwise illegal, they may follow the lands in the hands of subsequent purchasers with notice.

8. *Jurisdiction of equity to enforce such covenant.*—A court of equity will enforce by injunction, against a sub-purchaser with notice, a covenant running with the lands, and restricting the use thereof; and this jurisdiction is not dependent on the insolvency of the defendant.

APPEAL from the Chancery Court of Wilcox.

Heard before the Hon. N. S. GRAHAM.

The original bill in this case was filed on the 30th October, 1879, by Mrs. Sarah S. Robbins, Mrs. Viola S. Curtis, and Mrs. Alice G. Mayer, married women, who sued as the heirs at law of their deceased father, Robert H. Gregg, against William H. Webb; and sought to enjoin and restrain the defendant from the further use of a public warehouse and landing on the river, just below another warehouse and landing known as "Lower Peach Tree Landing," which belonged to the complainants, on the ground that such use of the property was violative of a covenant running with the land, which was attached to it by the terms of the sale and conveyance by said Robert H. Gregg to the defendant's vendor, and of which the defendant had notice at or before the time of his purchase. The case was before this court at a former term, on appeal

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from a decree of the chancellor dismissing the bill on demurrer, and dissolving the injunction which had been granted when the bill was filed; when the decree was reversed, and the cause remanded.—*Robbins v. Webb*, 68 Ala. 393.

After the amendment of the cause, the bill was amended.

It appears from the allegations of the bill, the exhibits, and the proof, that in February, 1859, said Robert H. Gregg being then the owner of the said warehouse and landing at Lower Peach Tree, and also the adjoining tract of land on which the defendant's warehouse was afterwards erected; and one Alexander McLeod desiring to purchase the latter tract of land, on which he intended, in conjunction with one Thomas C. Smith, to establish another warehouse and public landing; said Gregg refused to sell any part of the land, unless McLeod would give a written obligation binding himself and said Smith not to erect or permit the erection of any public warehouse and landing for receiving and shipping goods on the river at that point; and this condition was acceded to by said McLeod and Smith. In pursuance of this agreement, McLeod and Smith executed to Gregg a penal bond, which was dated February 19th, 1859, and conditioned as follows: "The condition of this obligation is, that on this day and date above written, the said Alex. McLeod has bought of said R. H. Gregg one certain lot of land, lying and being on the Alabama river," &c., describing it; "they having agreed with the said Gregg, that they will not themselves, nor by their executors, administrators, or assigns, directly or indirectly, ever permit or allow any warehouse, or place for the shipping or receiving of goods, either upon or through said premises; and that they will always allow said R. H. Gregg, freely and unmolested, to use said premises for the delivery of spars and lumber." On the 26th February, 1859, Gregg and wife executed and delivered to said Smith, at the instance of said McLeod, an absolute conveyance of the tract of land, reciting the payment of \$3,000 as its consideration, and containing full covenants of warranty; and this conveyance contains no restriction on the use of the premises conveyed, and no reference to the written obligation above mentioned. Copies of this conveyance and of said obligation were made exhibits to the bill, and it was alleged that they were parts of one and the same transaction, and that the defendant was informed of the existence and extent of this covenant and obligation at and before his purchase of the land. The conveyance by said Smith and wife to the defendant was dated April 2, 1878, and it contains no reference to the obligation, or the restricted use of the land. The bill alleged that the complainants were "the sole owners of said Lower Peach Tree warehouse, landing and property, and it belongs to them as their separate estate

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under the married women's law of the State of Alabama"; and it contained the further allegations, that said Smith and the defendant were each insolvent, and that the estate of said McLeod, who was dead, was insolvent.

After the remandment of the cause, the bill was amended by striking out the averment that the complainants sued as the heirs at law of said Robert H. Gregg, and adding an averment in these words: "Complainants own and possess said warehouse, landing and property, through, under, and by virtue of a certain deed of conveyance by the said Robert H. Gregg, and through, under, and by virtue of the last will and testament of said Gregg, and through, under, and by virtue of certain mesne deeds and conveyances, made by those to whom said Gregg conveyed and devised said property; all of which deeds, conveyances and will were made, executed, probated and delivered before the commencement of this suit, as will be made fully to appear by the production thereof," &c. The allegation as to the character of the complainants' estate in the lands was not struck out. These several conveyances were produced and proved, and their contents, or the material parts thereof, are stated in the opinion of the court.

After the remandment of the cause, and the overruling of the defendant's demurrer, he filed an answer to the bill; admitting that, "before the sale of said lands by said Smith and others to him, respondent was informed by said Smith of the existence of some such obligation," but alleging that he had never seen or read the obligation until some time after his purchase was consummated; also denying that the obligation was binding on him, or was of any legal effect whatever except between the immediate parties; denying the allegation as to the complainants' ownership of the land, and requiring strict proof thereof; and denying the allegations as to the insolvency of Smith and himself.

On final bearing, on pleadings and proof, the chancellor rendered a decree for the complainants; and his decree is now assigned as error.

The appeal was sued out on the 7th September, 1882, and an appeal bond was filed and approved on that day. On the 1st March, 1883, a citation was issued by the register, notifying the appellees to "appear at the April term, 1883, of the Supreme Court of Alabama, to defend against said appeal;" and service of this citation was acknowledged on the same day. On the 24th of March, 1883, the register issued another citation, which, after reciting that it was "impossible to have the transcript in said cause ready in accordance with the citation heretofore issued," notified the appellees to "appear on the first Tuesday in May, 1883, of the December term, 1882, of

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the Supreme Court of Alabama, to defend on said appeal." The certificate of the register states, that the appeal was taken to the "first Tuesday in May, 1883, of the December term, 1882." The transcript was filed in this court on the 27th April, 1883. On these facts, as shown by the record, the appellees submitted a motion to dismiss the appeal; and the cause was also submitted on the merits at the same time.

R. GAILLARD, and JNO. Y. KILPATRICK, for the appellant. (1.) The conveyance by Mrs. Gregg to Mrs. Robbins created an equitable estate in the grantee.—*Short v. Battle*, 52 Ala. 456; *Smith v. McGuire*, 67 Ala. 34. (2.) As to the claim and title of Mrs. Robbins, the variance between the allegations and the proof is fatal.—*Milhous v. Weeden*, 57 Ala. 502; *Schaffer v. Lavaretta*, 57 Ala. 14; *Alexander v. Taylor*, 56 Ala. 60. (3.) As one of the complainants can not recover, the misjoinder is fatal to the others.—*Jones v. Reese*, 65 Ala. 135; *Dunklin v. Wilson*, 64 Ala. 162; *Johnson v. Murphy*, 60 Ala. 288; *Schaffer v. Lavaretta*, 57 Ala. 14. (4.) The proof shows that the complainants are married women, and their husbands should have been joined with them as complainants.—*Pitts v. Powledge*, 56 Ala. 150; *Sawyers v. Baker*, 72 Ala. 49; *Michan v. Wyatt*, 21 Ala. 813. (5.) Gregg's conveyance to Smith, and Smith's bond to Gregg, are dated on different days, with an interval of seven days between them, and the latter in date contains no reference to the former; and it is submitted that, on the evidence, they are not shown to constitute parts of one and the same transaction. If the two instruments are to be construed together, the obligation or restriction does not run with the land, so as to bind the defendant, being in restraint of trade and commerce, though it may have been valid as against Smith and McLeod.—2 Washb. Real Property, 688; 2 Stockt. Ch. 189; 7 El. & Bl. 816; *Brewer v. Marshall*, 3 C. E. Green, 337; 4 Ib. 537; *Kellogg v. Wood*, 4 Paige. (6.) The allegation of insolvency is denied by the answer, and is not proved; and without such insolvency, the complainants have an adequate remedy at law, if they are injured.

S. J. CUMMING, *contra*. (No brief on file.)

STONE, C. J.—The motion to dismiss the appeal in this case is based on a misapprehension of the effect of the act approved March 6, 1875.—Code of 1876, § 3925. The terms of that statute do not make it compulsory that appeals, taken during the session of this court, *shall be* made returnable to the first Tuesday in some month of the term, during which the ap-

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peal is taken. It only provides that they may be so taken. This statute provides only a cumulative remedy, and does not repeal section 3916 of the Code. We have several times held, that when an appeal is taken to this court, which is silent as to the time to which it is returnable, whether such appeal is taken during vacation, or during a term of this court, it stands returnable, by the mere force of the statutes, to the regular annual term of this court, which commences its session next after the suing out of the appeal. The appeal in this case, being sued out in September, 1882, was returnable to the first Tuesday in December, 1882. There was but one appeal in this case, although the clerk issued two citations. Citations do not constitute an appeal. They are only notice that one has been taken.

Nor does the fact that no notice is taken of an appeal at the term to which it is taken, nor that the transcript is not then filed, impair the force of the appeal, unless the appellee invoke and obtain the action of the court, on a motion to affirm for want of a transcript, or for want of assignment of errors; or a certificate is obtained under the 29th rule of practice in this court. Nothing being done at such first term, the cause passes over to the next term. The motion to dismiss the appeal is overruled.—Code, § 3953.

The bill, § 7, avers that the Lower Peach Tree warehouse, landing and property belong to the three complainants, Sarah S. Robbins, Viola S. Curtis, and Alice G. Mayer, and that they belong to them "as their separate estate under the married women's law of the State of Alabama." This is equivalent to an averment, that it is their statutory separate estate. The answer to this averment is, "that he can not admit that the complainants are the sole owners of said Lower Peach Tree Landing, warehouse and property, and that it belongs to them as their separate estate under the married women's law of the State of Alabama, and requires strict proof of said allegation." There was an amendment of the bill, filed December 24, 1879, but it does not relate to this question. The proof shows that Mrs. Sarah S. Robbins owned two-thirds of the said property by regular chain of documentary title, from R. H. Gregg, her father, down to her. The deed to her was from her mother, Elizabeth H. Gregg; and Mrs. Robbins being then a married woman, the language of that deed—"to the only proper use and behoof of the said Sarah S. Robbins, her heirs and assigns," under our uniform rulings, vested in her an equitable separate estate as to the said two-thirds of said property.—*Cuthbert v. Wolfe*, 19 Ala. 373; *Caldwell v. Pickens*, 39 Ala. 514; *Short v. Battle*, 52 Ala. 456; *Miller v. Vass*, 62 Ala. 122; *Smith v. McGuire*, 67 Ala. 34.

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The third of the property which had belonged to William E. Powe, depends on a different chain of title. Powe had conveyed his third to Hestle, trustee, to secure the payment of a debt of four thousand four hundred dollars, acknowledged to be due from him to his five children, Lavinia E., then the wife of Hestle, the trustee, Clara S., Alice G., Viola S., and Margaret E., Powe. This mortgage security contained a power of sale. Margaret E. has died, and the others have married. There is no documentary evidence that Hestle has ever sold or conveyed this property; but Robbins testified such sale was made, and that the four daughters, Lavinia, Clara, Alice and Viola, became the purchasers. This proof was oral, but no exceptions were filed to its admissibility before the chancellor. *Binford v. Dement*, 72 Ala. 491. Taking this testimony into the account, it is shown that Alice Mayer and Viola Curtis each became the owner of one-fourth of Powe's third interest, equal to one-twelfth of the entire ownership of the property; and the remaining two-fourths of that third—two-twelfths of the whole property—became the property of Sarah S. Robbins. These conveyances have no words of exclusion, and consequently these titles create a statutory separate estate. It is thus shown that, as to eight-twelfths of this property, Mrs. Sarah Robbins holds it as her equitable separate estate; while, as to the remaining four-twelfths, they are statutory separate estate—two-twelfths being in Mrs. Robbins, and one-twelfth each in Alice Mayer and Viola Curtis. There is a fatal variance between the allegations and proof, as the pleadings now stand. *Milhous v. Weeden*, 57 Ala. 502; *Conner v. Smith*, 74 Ala. 115; *Young v. Hawkins*, *Ib.* 370; *Lewis v. Montgomery B. & L. Asso.*, 70 Ala. 276; 1 Brick. Digest, 743, § 1538.

No question is raised by the pleadings as to the non-joinder of complainants' husbands, as their trustees. Should an amendment be offered, it would be well to consider that question. *Pitts v. Powledge*, 56 Ala. 147; *Sawyer v. Baker*, 72 Ala. 49.

There is found in the transcript what purports to be an amendment to the bill, offered on the day the cause was submitted. No ruling seems to have been had upon it. It does not cure the errors in the bill, nor harmonize it with the proof.

With the exception of the variance above pointed out, we think the complainants have fully made out their case. The points are, first: That the two instruments—the deed and bond—were executed at one time, and were intended to relate to one and the same transaction. We think this is satisfactorily proved; and if the positive testimony leaves the question at all in doubt, the conduct of Smith under it, and even the conduct of Webb, while he was in possession as tenant, leave no doubt that the bond was intended to be a restriction on

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Smith's right of use. The proof comes fully up to the principles declared when the case was before us on the pleadings. *Robbins v. Webb*, 68 Ala. 393. Second: Had Webb notice of the bond before he concluded his purchase? Speaking of the bond or obligation given by Smith and McLeod, not to do or suffer warehousing or shipping on or from the lands purchased, Webb, in his answer, says: "He admits that he was informed by the said Smith, before the said sale by said Smith and others to him on the 2d April, 1878, of the existence of some such obligation." This, without more, was enough to make it Webb's duty to seek from Robbins, or those claiming the warehouse property, information of the nature of such obligation, if any existed; and failing to do so, he is chargeable with notice of every thing such inquiry would have led to. *Hodges Bros. v. Coleman & Carroll*, 76 Ala. 103. It can not be questioned, that if he had made the inquiry, he would have learned the exact state of the case. We think, however, the testimony in this case authorizes us to go further. We are convinced that Webb, before the trade was concluded, if not before it was entered upon, knew the nature of the obligation, and that he acted on the belief—possibly on advice—that such obligation enured to the benefit of R. H. Gregg alone, and only bound Smith and McLeod; and that it could not operate for or against any other person, succeeding to the ownership of the several parcels of land.

It is clearly competent, in making a sale of real estate, to retain an easement or servitude in the lands sold; and, when not in general restraint of trade, the seller may retain in himself certain uses of the freehold, which would otherwise pass to the grantee. Such retention, or limitation of the use, being a condition upon which the estate is acquired, attaches as an infirmity in the estate itself, and as a privilege or easement in the estate of the grantor, in whose favor the limitation is imposed. This easement and this disability follow the several parcels of land, into whose hands soever they may pass, with notice, actual or constructive, of their existence. If the limitation or restriction is expressed in the conveyance, that is notice to all persons acquiring an interest in the freehold. If not so expressed, then notice must be otherwise shown, to charge a purchaser with the servitude. We think this case falls directly within this principle, and that the owners of Lower Peach Tree landing and warehouse property are entitled to a perpetual injunction, as prayed for, upon making their allegations of title correspond to their proof. And this is a case peculiarly within the jurisdiction of a court of equity, which does not require the insolvency of the defendant to uphold it.—High on Injunctions, 2d ed., §§ 850, 851, 1153, 1154;

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Hills v. Miller, 3 Paige, 254; *Trustees of Watertown v. Cowen*, 4 Paige, 510; *Seymour v. McDonald*, 4 Sandf. Ch. 502; *Clark v. Martin*, 49 Penn. St. 289.

Reversed and remanded.

Danner Land and Lumber Co. v. Stonewall Insurance Co.

Bill in Equity by Creditors, assailing Absolute Conveyance as Fraudulent, because intended only as Mortgage.

1. *When absolute conveyance will be declared mortgage, and therefore fraudulent as against creditors.*—A conveyance which, though absolute on its face, was intended to operate only as a mortgage, or security for a debt, is fraudulent and void as against the creditors of the grantor; but it will not be so declared at their instance, unless the evidence is clear and convincing, since the law never strives to force conclusions of fraud.

2. *Answer, as evidence against co-defendant.*—The unsworn answer of one defendant is not admissible as evidence against another; and admissions contained in the answer of the grantee, that the conveyance was intended only as a mortgage to secure the repayment of borrowed money, can not be received as evidence against the grantor, or a subsequent assignee for the benefit of creditors, when the conveyance is assailed for fraud, on the ground that it was intended only as a mortgage.

3. *Admissions or declarations of agent; when admissible as evidence against principal.*—The admissions and declarations of an agent are not binding on his principal, nor competent evidence against his principal, unless made within the scope of his authority, and while in the discharge of his duties in and about the particular transaction of which they constitute a part of the *res gestæ*; and this principle applies equally to the agent of a corporation and of a natural person.

4. *Absolute conveyance, with subsequent agreement for re-purchase; retention of possession by vendor, as badge of fraud; agreement not to record deed.*—A conveyance which is absolute on its face will not be declared a mortgage, and therefore fraudulent as against creditors, because it is shown that, a few days after the consummation of the transaction, the parties entered into a new contract in writing, by which the purchaser gave the vendor a right to re-purchase the property at the same price; nor will the transaction be held fraudulent, because the vendor remained in possession after the sale, when it is shown that this was under an agreement to pay rent; nor because the grantee agreed to withhold the deed from record, for fear of injuring the credit of the grantor, but nevertheless did record it by advice of his attorney.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 4th of November, 1884, by the *Stonewall Insurance Company*, a domestic corporation, and other creditors of the *Danner Land and Lumber Com-*

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pany, another domestic corporation doing business in and near the city of Mobile; against the said Land and Lumber Company, the Mobile and Ohio Railroad Company, Wm. B. Duncan, G. Jordan, A. C. Danner, and J. C. Strong; and sought to set aside a conveyance executed by said Danner Land and Lumber Company to Jordan, on the ground that, though absolute on its face, it was intended merely as a mortgage to secure the repayment of \$20,000 borrowed by said company from Jordan as the agent of the railroad company or Duncan, or as a conditional sale with a reservation of the right to re-purchase; and to have the property subjected by sale, under the decree of the court, to the satisfaction of the complainants' several debts. Danner was the president and active manager of said corporation, and Strong, who had been its secretary, was made trustee in an assignment which had been executed for the benefit of its creditors after the execution of the conveyance to Jordan, and which conveyed the company's interest in the same property.

The conveyance to Jordan, a copy of which was made an exhibit to the bill, was dated August 4th, 1884, and recited the present payment of \$20,000 as its consideration; and the property conveyed by it, known as the "Venetia Mill Property," contained about two thousand acres of land, with its appurtenances. On the 8th August, 1884, said Danner Land and Lumber Company also executed to A. S. Gaines, as trustee, a deed conveying a large quantity of lumber, logs, &c., then lying at or near the wharves in Mobile, and loaded on vessels for foreign export, valued at over \$20,000; in trust for the payment of four promissory notes held by Jordan, of \$5,000 each, payable three, four, five, and six months after date; which notes, it appeared, were given by said company to Jordan on an agreement for the re-purchase of the same property; and he gave them his bond, also dated August 8th, 1884, conditioned to make titles to the property on the payment of these notes at maturity. A copy of the deed to Gaines was made an exhibit to the bill, and it was charged that this deed and the conveyance to Jordan were parts of one and the same transaction. The bill alleged, also, that said corporation was greatly embarrassed in July, 1884, and ceased to do business in October afterwards; executing to said Strong, as trustee, an assignment for the benefit of its creditors, a copy of which was made an exhibit to the bill.

An answer to the bill was filed by the M. & O. Railroad Company, denying all knowledge of the various transactions, and disclaiming all interest. An answer was filed by Duncan, admitting that the conveyance to Jordan was intended only as a mortgage to secure the re-payment of \$20,000, which he had

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lent to said company through Jordan as his agent; denying all fraud, and insisting that the money so lent had been used for the benefit of the creditors in paying off the liabilities of the corporation; and he claimed that a balance of nearly \$3,000 was still due to him, after crediting his debt with the proceeds of all the lumber sold. Jordan died, without having answered; and the cause having been revived against his widow, as executrix and sole devisee, she filed an answer, admitting that the transaction was only a loan of money made by her husband, as agent for said Duncan, to said corporation, and that the conveyances were only intended to secure the repayment of this borrowed money. Danner also filed an answer, denying that the conveyance to Jordan was intended as a mortgage, or that the transaction originated in a loan; alleged that Jordan proposed to purchase the property absolutely for \$20,000, and that his proposal having been submitted to the corporation, and by it accepted, the transaction was completed by the execution of the conveyance and the payment of the money, as therein recited; that he did not know at the time for whom Jordan was acting, but supposed he was acting for Duncan; that he believed at the time that Jordan and his principal did not want the property, but were only acting for the interest of the corporation, and would give the corporation an opportunity to re-purchase the property, and he so informed the directors; and that the agreement for the re-purchase, evidenced by the notes to Jordan, the deed of trust to Gaines, and Jordan's bond for title, was an entirely distinct transaction, entered into at his suggestion, and accepted by Jordan, on the day the papers bore date. An answer was filed by Strong, the assignee in the deed of trust, denying that the conveyance to Jordan was intended as a mortgage, or originated in a loan; asserting that Danner, as president of the company, had no authority to borrow money for it, or to mortgage the property; and insisting on the validity of the several conveyances, and his rights under the deed of assignment.

The complainants took the depositions of several persons, citizens of Mobile, who testified to conversations had by them with said Danner, a few days after the execution of the conveyance to Jordan, which was brought about by a publication, in the Mobile newspapers, of the fact that such a conveyance had been executed, and in which Danner stated, in substance, that the transaction was only a temporary loan, and that he would be able to redeem the property within six months; and he complained of the publication as a breach of Jordan's promise not to record the conveyance, but afterwards said, in other conversations, that Jordan said he had acted under the advice of his attorney. At the time of filing cross-interroga-

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tories, Strong and the corporation, his assignor, each objected to the interrogatories calling for these statements of Danner. The complainants also took the deposition of said Danner, but they did not offer it in evidence on the hearing, and it was read as evidence on the part of Strong. In said deposition, Danner gave the same account of the several transactions as in his answer, but with a fuller and more particular statement of the details.

At the hearing, as the "note of evidence" shows, the cause was submitted by the complainants, on the original bill and exhibits, the answers of Duncan and Mrs. Jordan, and all the depositions they had taken except Danner's; and on the part of Strong, on his own answer, the answer of said corporation, and the deposition of Danner. The chancellor held that the transaction with Jordan was a loan of money, and the conveyance to him an equitable mortgage only, which was fraudulent and void as against the complainants; and he therefore rendered a decree for the complainants, ordering the property to be sold by the register, and the proceeds to be distributed *pro rata* among the several complainants. From this decree Strong appeals, and here assigns it as error.

PILLANS, TORREY & HANAW, for appellant.

L. H. FAITH, *contra*.

SOMERVILLE, J.—The bill is filed by certain creditors of the Danner Land and Lumber Company, for the purpose of having declared fraudulent and void, as against them, a certain conveyance made by the defendant corporation to one Jordan, and bearing date the fourth of August, 1884. The conveyance is on its face a mere deed, absolute and unconditional. The effort of the complainants in the bill is to show that there was an understanding between the parties, at the time of its execution, that it should operate only as a mortgage given as a security for borrowed money, or else as in the nature of a conditional sale, by which the vendor orally reserved the right to re-purchase the property conveyed. It is insisted that this was such a secret reservation of an interest in the vendor as to vitiate the conveyance, because its effect was to hinder, delay, or defraud the creditors of the grantor.—*Sims v. Gaines*, 64 Ala. 392.

The rule is, that where a conveyance is on its face an absolute deed, it will not be declared a mortgage, or conditional sale—in contravention of its express terms—unless the evidence supporting this conclusion is clear and convincing.—*Turner v. Wilkinson*, 72 Ala. 361; *Parks v. Parks*, 66 Ala. 326. The rule is analogous to the principle, that a court of equity will

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not decree the reformation of a written instrument on the ground of mistake, on parol evidence only, unless the mistake is plain, and is clearly established by full and satisfactory proof.—*Marsh v. Marsh*, 74 Ala. 418. The reason of the rule is unimpaired, where the result is to render the conveyance fraudulent, because the law never strives to force conclusions of fraud, and if the facts in evidence are fairly susceptible of an honest intent, that construction will be placed upon them.—*Crommelin v. McCauley*, 67 Ala. 542; *Thames v. Rembert*, 63 Ala. 561.

2. The unsworn answers of the defendants, Duncan and Mrs. Jordan, are clearly inadmissible against their co-defendants, Strong and the Danner Land and Lumber Company. We can not, therefore, look to any admissions contained in them, with the view of allowing these admissions any weight in considering the question in issue.—*Thames v. Rembert*, 63 Ala. 561; *Adam's Eq.* (7th Am. Ed.), 20.

3. The declarations of Danner, who was president and business manager of the Danner Land and Lumber Company, made to Davis and others, several days after the delivery of the deed in question, were inadmissible against either the company or the defendant Strong, its assignee, for the purpose of showing that the contracting parties intended such deed to operate either as a mortgage or a conditional sale. The declarations and admissions of any agent of a corporation stand clearly on the same footing with those of an agent of a natural person. "To bind the principal, they must be within the scope of the authority confided to the agent, and must accompany the act or contract which he is authorized to make."—*Angell & Ames on Corp.* (11 Ed.), § 309; *Marlett v. Leree & Cotton Press Co.*, 29 Am. Dec. 463. As said by this court, in *Smith v. Plank-Road Co.*, 30 Ala. 650, 667, "a corporation is not bound by the declarations of its officers, unless made when acting for it, and about the business which they are transacting for it." It certainly is not within the scope of an agent's authority to bind his principal by admissions and declarations having reference to by-gone transactions. Such declarations, to be admissible, must have been made while the agent was in the discharge of his duties as agent, and be so clearly connected with the main transaction, which is sought to be elucidated or explained by them, as to constitute a part of the *res gesta* of such transaction.—*Ala. Gt. So. R. R. Co. v. Hawk*, 72 Ala. 112, 117; 1 Greenl. Ev. § 113; *Mateer v. Brown*, 52 Amer. Dec. 303.

These declarations of Danner were not made while in the discharge of his duties as agent of the company, duly authorized to execute the deed to Jordan. This transaction was completed, and the declarations were merely narrative of it; and for this reason they were inadmissible.

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4. Discarding the admissions of Duncan and of Danner, we find no other decisive evidence in the record bearing on the question under consideration, except the deed itself, followed by an agreement on Jordan's part, entered into a few days afterwards, to sell the same property back to the vendor for the same price; and the testimony of Danner himself, in full explanation of the entire transaction. Danner shows that he had express authority from the board of directors of the company to sell and convey the land in question to Jordan, absolutely and unconditionally, and that this was done in pursuance of such authority. He had no authority to mortgage the land, or to contract for its re-purchase; and he testifies that he did not do so, expressly or by implication, at or before the time of the sale. He admits he had both the hope and the expectation of re-purchasing, but that no legal obligation rested on Jordan, who, it seems, was the mere agent of Duncan, to permit this; nor was there any understanding to this effect, until the new agreement was made on the eighth of August,—four days after the date of the deed of conveyance to Jordan. The evidence, in our judgment, decidedly preponderates in favor of this version of the transaction.

The retention of the premises by the vendor is sufficiently explained by proof of an agreement to pay rent to the vendee. And the agreement of Jordan to withhold the deed from the record,—which seems not to have been carried out, upon his being informed by counsel of the hazard attending it,—was a mere badge of fraud, which is fully explained by a desire on his part not to injure the credit of the vendor. This agreement injured no one, because no one was induced to extend credit to the grantor on the faith of it.—Bump on Fraud Con. (3rd Ed.), 38-40. The complainants, who are creditors, can not, for this reason, make it the *gravamen* of any legal complaint.

The decree of the chancellor, adjudging the conveyance in question to be fraudulent and void as against the complainants, is not, in our opinion, supported by the evidence. The decree is, therefore, reversed, and a decree will be rendered in this court, dismissing the bill of the complainants, who will be taxed with the costs incurred in this court and in the court below.

Lewis v. Coffee County.

Action by County, on Statutory Bond for protection of Public Bridges against Injury from Rafts.

1. *What streams are navigable.*—A river or stream above tide-water is, *prima facie*, private, and not subject to the public right of floating or rafting timber; but it will be held navigable, or subject to the public right of user, on proof that it has, in its natural state, sufficient depth and width to be used for the transportation of timber or logs, or the products of the forest, the mines, or the tillage of the country along its banks, to market; not necessarily at all seasons of the year, but periodically, and for a time long enough at each period to make it susceptible of beneficial use to the public.

2. *Same.*—Under the tests and rules established by the former decisions of this court and other authorities, Pea River in Coffee county can not be considered a navigable stream, when the evidence only shows that it is “a stream upon which logs could be floated only at high water, or during a freshet, by the public generally, to Pensacola, Florida, where it was generally marketed.”

APPEAL from the Circuit Court of Coffee.

Tried before the Hon. H. D. CLAYTON.

This action was brought by Coffee County as plaintiff, against J. L. Lewis, A. H. Rodgers, and others; and was founded on a penal bond executed by the defendants, which was dated the 14th April, 1883, and conditioned as follows: “The condition of this bond is such that, whereas the said A. H. Rodgers has about one hundred and fifty sticks of hewn and sawn timber, in White Water creek in said county, which he is desirous of rafting and running down said creek into Pea River, both of said streams in said county, and across both of which public bridges have been built by said county; now, if the said Rodgers shall run his said timber down said stream, without any injury to any of the public bridges on said streams in said county, then this bond to be void; but, should injury result to any of said bridges, or any one or all of them be knocked down, destroyed, or otherwise damaged by reason of the running or rafting of said timber down said streams, by the said Rodgers or any other person or persons, then this bond shall be and remain in full effect,” &c. The complaint set out the bond, and alleged as a breach thereof that, on or about the 14th April, 1883, the bridge across Pea River at Elba was knocked down and injured by the raft of said Rodgers. There was a demurrer to the complaint, which was overruled, and which it is unnecessary to notice; and sev-

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eral pleas were filed, to which demurrers were sustained. The main defense was, that Pea River was a navigable stream, that the county had no right to erect a bridge over it, and that the bond was therefore without legal consideration; and this defense was presented, both by the pleas, and by the charges requested on the evidence. "On the trial," as the bill of exceptions states, "the evidence showed that the stream over which said bridge was erected by the Commissioners Court, was a stream upon which logs could be floated only at high water, or during a freshet, by the public generally, to Pensacola, Florida, where it was generally marketed; that the bond sued on was given to prevent any injury to said bridge while the defendants were running their timber down said stream to market, and that there was no other consideration for said bond. This being all the evidence necessary to be set out, the defendants requested the court, in writing, to instruct the jury that, if the jury believed the evidence as to the consideration of said bond, they must find for the defendants." The court refused this charge, and the defendants excepted to its refusal; and they now assign its refusal as error, with other rulings which require no special notice.

N. W. GRIFFIN, and W. D. ROBERTS, for the appellants, cited *Pennsylvania v. Wheeling Bridge Co.*, 13 Howard, 519; *Railroad Co. v. Ward*, 2 Black, U. S. 245; Cooley's Const. Lim. 382-3; Sedgw. Stat. and Const. Law, 167; *Peters v. Railroad Co.*, 56 Ala. 528; *Walker v. Allen*, 72 Ala. 456.

JNO. D. GARDNER, and H. L. MARTIN, *contra*.

CLOPTON, J.—By "An act to provide for the security and protection of the public bridges in the county of Coffee" (Acts 1882-3, 257), it is declared unlawful for any person to float any raft of timber or logs down any of the streams in the county of Coffee, where there are one or more public bridges, without having first filed a bond in the office of the judge of probate, approved by him, payable to the county, in a sum not less than five hundred, nor more than one thousand dollars, at the discretion of the judge of probate, and conditioned to pay all such damages as may result to any of the public bridges therein, in consequence of the floating of any timber or logs over any of the streams in the county where such bridge is located. The action is brought by the county, to recover damages for the breach of a bond given under the provisions of this act; and the defense insisted on is, that the stream, across which the bridge is erected, is a navigable water;

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that the statute is unconstitutional, and the bond is without a valid or legal consideration.

Pea River, the stream in question, is above tide-water, and *prima facie* private – not subject to the public right of floating or rafting timber or logs. Every definition of a navigable fresh-water stream must be necessarily general, modified to some extent by the peculiar conditions of its locality and the special wants of the inhabitants. In sections where the transportation of lumber is an important or controlling business, circumstances and the necessities of trade have impressed the character of navigability, which fail in other conditions where no such pressing necessities exist, and there are other interests equally or more important to subserve. It may be said, generally, any stream, though above tide-water, “of sufficient capacity to float the products of the mines, the forests, or the tillage of the country, through which they flow, to market,” is a navigable water; and, by the act for the admission of Alabama into the Union, “shall forever remain public highways, free to the citizens of said State and of the United States.” Said FIELD, J., in *The Daniel Ball*, 10 Wall. 557: “Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact, when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.” And in *The Montello*, 20 Wall. 430, it is said: “It would be a narrow rule to hold that, in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable, in its natural state, of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway.” As the result of the current of authorities, it may be conceded, that a stream of sufficient depth and width, in its natural state, to be used for the transportation of timber or logs, though it may not not be technically navigable, is subject to the public right of *user*.

The question, what constitutes a navigable stream, has been heretofore considered by this court, and the tests applicable have been determined. In *Ellis v. Carey*, 30 Ala. 725, it was held, that a creek, not affected by the ebb and flow of the tide, which had never been declared a public highway by legislative authority, and was not treated as a navigable stream by the United States surveyors, is not a navigable stream, though

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during twenty years keel-boats, loaded with cotton, had been several times floated, and timber and lumber rafted down it during the winter season, but during the summer there was not sufficient water for these purposes. A distinguishing test, approved by the court, was, whether a stream is "susceptible or not of use as a common passage by the public." In *Rhodes v. Otis*, 33 Ala. 578, it was said: "In determining the character of a stream, inquiry should be made as to the following points: whether it is fitted for valuable floatage; whether the public, or only a few individuals, are interested in transportation; whether any great public interests are involved in the use of it for transportation; whether the periods of its capacity for floatage are sufficiently long to make it susceptible of use beneficially to the public; whether it has been previously used by the people generally, and how long it has been so used; whether it was meandered by the government surveyors, or included in the surveys; whether, if declared public, it will probably in future be of public use for carriage. And in the application of these inquiries to the facts of a case, it is to be remembered that the *onus probandi* is upon the party claiming that a stream above tide-water is public." These tests were cited with approval in *Peters v. N. O., Mo. & Chatt. R. R. Co.*, 56 Ala. 528.

We do not understand, that to constitute a navigable stream it is requisite there shall be sufficient water for the common uses of trade and commerce during all seasons of the year. It must, however, as the results of natural causes, be capable of valuable floatage periodically during the year, and so continue long enough at each period to make it susceptible of beneficial use to the public. Says Cooley: "If a stream is of sufficient capacity for the floating of rafts and logs in the condition in which it generally appears by nature, it will be regarded as public, notwithstanding there may be times when it becomes too dry and shallow for the purpose. . . . A brook, although it might carry down saw-logs for a few days, during a freshet, is not therefore a public highway." In general, a stream, to be navigable, in its legal meaning, must be of such character, as to be of actual or practical utility to the public as a channel of trade or commerce.—*Hickok v. Hine*, 23 Ohio St. 523; *Hubbard v. Bell*, 54 Ill. 110; *Wethersfield v. Humphrey*, 20 Conn. 218; *Neaderhouser v. State*, 28 Ind. 257; *Barclay R. & C. Co. v. Ingham*, 36 Penn. St. 194; *Rowe v. Granite Br. Co.*, 21 Pick. 344; *Morgan v. King*, 35 N. Y. 459; *Thunder Boom Co. v. Speechley*, 31 Mich. 336.

The only evidence respecting the navigability of the stream, shown by the record, is, that it "was a stream upon which logs could be floated only at high water, or during a freshet, by the

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public generally, to Pensacola, Florida, where it was generally marketed." There is no inquiry, whether it is suitable for valuable floatage or rafting; to what extent the public are interested in transportation; what public interests are involved; whether the stream had been previously used, and how long, or what length of time, the capacity for floatage or rafting continued. On the facts shown by the record, Pea river is not a navigable stream at the place where the bridge is erected.

This conclusion renders unnecessary a consideration of the other questions presented in the argument of counsel.

Affirmed.

Fire Insurance Companies v. Felrath.*Actions on Policies of Insurance against Loss by Fire.*

1. *Assignment of policy; when assignee may sue in his own name.* When a policy of insurance is assigned pursuant to its terms, the assignee may maintain an action on it in his own name, in the event of a loss (Code, § 2890); but, where a policy is taken out by the mortgagor in his own name, the addition of the words, "Loss, if any, payable to J. F., to the extent of his mortgage interest," is a mere appointment of a part of the money, and does not constitute an assignment; nor does it authorize said J. F. to maintain an action on the policy in his own name, though the partial loss does not exceed the amount due on his mortgage.

2. *Stipulations in policy as to proof of loss, examination of assured, &c.; when conditions to right of recovery.*—There is no rule of law, or of public policy, which forbids parties, when entering into contracts of insurance, from stipulating that, in case of loss, the preliminary proofs thereof shall be furnished by the assured himself; that he shall submit himself to be examined on oath, and shall procure the certificate of a magistrate as to certain designated facts; and when these stipulations are made in the policy, a compliance with them is a necessary condition to a right of recovery, unless performance has been waived by the insurer.

3. *Waiver of defects or irregularities in proofs of loss.*—When notice and preliminary proof of loss are served within a reasonable time, the insurer must answer within a reasonable time afterwards; and if he fails to do so, or refuses to pay without objection to the sufficiency of the proof, this is a waiver of any and all objection to its sufficiency; and if he points out certain alleged defects or irregularities in the proof, this operates as a waiver of all other defects or objections, however obvious or glaring.

4. *Same; reasonable time, as question of fact; general charge on evidence.*—What is a reasonable time, in such case, being a mixed question of law and fact, largely dependent on the particular facts of each case, must always be submitted to the jury, under appropriate instructions; and when the testimony is not clear, and free from conflict on material points, a general charge in favor of either party is an invasion of the province of the jury.

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APPEALS from the Circuit Court of Mobile.

Tried before the Hon. WM. E. CLARKE.

These three cases, involving the same facts and questions, were argued and submitted together. Each of the actions was brought by Joseph Felrath, and was commenced on the 31st July, 1883; the defendants being the North British and Mercantile Insurance Company of London and Edinburgh, the Germania Fire Insurance Company of New York, and the Hanover Fire Insurance Company of New York. Each action was founded on a policy of insurance against fire, issued by the defendant corporation, on a building in the city of Mobile which belonged to one James Clark, by whom the policies were taken out in his own name. Each of the policies was effected through the defendants' agent in Mobile, John C. Reese, and was dated June 12th, 1882; but each contained, on the body thereof, these words: "*Mobile, June 20th, 1882. Loss, if any, payable to Joseph Felrath, to the extent of his mortgage interest;*" signed "*John C. Reese, ag't.*" The insured building was partially destroyed by fire, on the morning of February 8th, 1883, before the expiration of the policies; the amount of damages, as proved on the trial, being \$1,070. The entire amount of insurance was \$1,550, one half of which was covered by the policy effected with the company first named, and the other half divided equally between the other two companies. The plaintiff's mortgage was dated June 19th, 1882, and was given to secure a debt of \$1,080, payable twelve months after date thereof. The material stipulations of the policies, which are stated in the opinion of the court, were substantially the same. The defendant, in each case, pleaded the general issue, and several special pleas; but demurrers were sustained to each of the special pleas, and the causes were tried on issue joined on the plea of the general issue. One of the special pleas averred the failure of said Clark to furnish the necessary proofs of loss, and to submit to a personal examination, as required by the terms of the policy; and another denied the plaintiff's right to maintain an action on the policy in his own name. The bill of exceptions purports to set out all the evidence, the material portions of which are stated in the opinion of the court. The court charged the jury, on the written request of the plaintiff, "that they must find for the plaintiff, if they believed the evidence, and assess his damages at whatever sum the evidence shows the same to be, with interest thereon from sixty days after the day on which proof of loss was furnished to the defendants; and that they must apportion the damages" among the three defendants in the ratio of the amount insured by each, as above stated. The defendants excepted to this charge, and they here assign it as error, together with the refusal of

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several charges asked by them, and the judgment sustaining the demurrers to their special pleas.

OVERALL & BESTOR, for appellants.—(1.) Felrath can not maintain these actions in his own name. The policies were taken out by said Clark in his own name, and for his own benefit; and the words subsequently incorporated in them, for the benefit of Felrath, do not operate as an assignment of the mortgage, or of any interest therein, but are a mere designation of the person to whom a part of the money is to be paid.—*Grosvenor v. Atlantic Insurance Co.*, 17 N. Y. 394; *Continental Insurance Co. v. Hulman*, 92 Illinois, 154; *Flanders on Fire Insurance*, 441; *Insurance Co. v. Stanton*, 57 Illinois, 354; *Insurance Co. v. Wetmore*, 3 Illinois, 221; *Mutual Insurance Co. v. Hanslein*, 60 Illinois, 521; *Franklin Savings Inst. v. Mutual Insurance Co.*, 119 Mass. 240; *Fogg v. Mutual Insurance Co.*, 10 Cush. 337; *Hale v. Mech. Insurance Co.*, 6 Gray, 169; *Loring v. Man. Insurance Co.*, 8 Gray, 28; *Mutual Insurance Co. v. Fix*, 53 Illinois, 151; 19 N. Y. 179; *Blanchard v. Atlantic Mutual Fire Insurance Co.*, 33 N. H. 9, 15; 5 Foster, N. H. 22, 205; 10 *Ib.* 231. (2.) But, even if Felrath could sue as assignee, neither he nor Clark could recover without proof of a compliance with the stipulations and conditions of the policies, each of which expressly provides that it shall not be payable, in case of loss, until Clark “shall have made the proofs, and submitted to the examinations herein required.” These conditions were inserted for the protection of the insurer against fraud, and the courts can not dispense with their performance. Proof of a compliance with them was as necessary to a right of recovery as proof of a loss.—*Ala. Gold Life Ins. Co. v. Thomas*, 74 Ala. 578; 20 Gratt. 614; 1 Otto, 510; 6 Otto, 544. There was not only no attempt to prove a compliance with these conditions, but it was shown that Clark had fled the city while his house was burning, and nothing had since been heard of him.

TOULMIN, TAYLOR & PRINCE, *contra*.—(1.) Stipulations in a policy as to notice and proof of loss are not conditions, and do not form a part of the contract of insurance. They do not create the liability to pay the loss, but only fix the time at the expiration of which the money must be paid.—*McMaster v. N. A. Insurance Co.*, 55 N. Y. 222, or 14 Amer. Rep. 239; 36 Md. 102, or 11 Amer. Rep. 476; H. & N.’s New Digest of Insurance, 355; May on Insurance, 217; 36 Wis. 159. (2.) Giving notice and making claim and proof of loss may be conditions precedent to a recovery, unless waived by the insurer; but notice by Felrath, and proof furnished by him, he being

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the real party in interest, were sufficient.—May on Insurance, §§ 463, 465; Wood on Fire Insurance, §§ 413-14; 41 Mich. 131; 16 Wise. 532; H. & N.'s New Digest, 493, and authorities there cited. (3.) If there was any defect or irregularity in the notice or proofs of loss, it was waived by the insurers. Wood on Fire Insurance, §§ 414, 417, 421; 31 Wise. 160; 26 Mich. 289; H. & N.'s New Digest, 493; 2 Clements' Dig. Ins. Dec. 252, § 7; 1 Rob. N. Y. 55; 31 How. Pr. (N. Y.) 505; 16 Wendell, 355; 26 Illinois, 365; 2 N. Y. 53; 7 Johns. 315. (4.) Felrath was the party really interested, and he could maintain the actions in his own name.—Code, § 2890; May on Insurance §§ 447-49; 38 N. J. 564; 40 Wise. 446; 46 Wise. 23; 50 Wise. 240; 60 N. Y. 619.

STONE, C. J.—1. Can Felrath maintain these actions in his own name? We think not, for the following reasons: The policies were taken out in the name, and in favor of James Clark, who owned the property. The gross sum of the policies was fifteen hundred and fifty dollars. Felrath had a mortgage on the property, but the policies were neither assigned nor transferred to him, so as to constitute them his property, nor to make him, Felrath, the party assured. The only interest Felrath had is shown on the face of the policies themselves, and is expressed in this language: "Loss, if any, payable to Joseph Felrath, to the extent of his mortgage." It is not stated what was the extent of his mortgage interest. It is shown in the proof that it was about two-thirds of the sum assured. The policies all bear the same date, expire at the same time, and were procured through the same resident agent. In case of loss, each company was bound to contribute *pro rata*, to the extent of the sum insured. This constitutes these several policies substantially one transaction—one contract—so far as Felrath's right to sue is concerned. Possibly, we might go further, and hold, from the known usage in such cases, that Clark applied to the agent for insurance to the extent of fifteen hundred and fifty dollars, and that the risk was parcelled out among several companies, in order that the burden might be apportioned, in case of loss. But this is not necessary. It is enough that the liability of all the companies was fifteen hundred and fifty dollars, and there are neither facts nor presumption that any one of these liabilities was incurred before the others were.

We have, then, a binding contract, or contracts, by which these companies bound themselves to pay to Clark, on a certain contingency, fifteen hundred and fifty dollars, with a direction and agreement, in case of loss, to pay one thousand and eighty dollars of the sum to Felrath. To whom, according to

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the terms of the contract, was the remaining sum of four hundred and seventy dollars to be paid? Evidently to Clark, the holder of the policies. This was the *status* of the contract, at the time the negotiations terminated in a final agreement. This was not an assignment of the policies, nor either of them, but a mere appointment of a part of the money to be realized upon them.—*Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 391; *Flanders on Fire Insurance*, 441; *Hale v. Mech. Mut. Fire Ins. Co.*, 6 Gray, 169; *Loring v. Manuf. Ins. Co.*, 8 Gray, 28; *Fogg v. Mid. Mut. Fire Ins. Co.*, 10 Cush. 337; *Bidwell v. North Western Ins. Co.*, 13 N. Y. 179; *New Eng. Mar. Ins. Co. v. Wetmore*, 3 Ill. 221; *Ill. Fire Ins. Co. v. Stanton*, 57 Ill. 354; *Ill. Mut. Fire Ins. Co. v. Fix*, 53 Ill. 151; *Blanchard v. Atl. Mut. Fire Ins. Co.*, 33 N. H. 9; *Newins v. R. Mut. Fire Ins. Co.*, 25 N. H. 22; *Folsom v. B. Co. Mut. Fire Ins. Co.*, 30 N. H. 231; *Home Mut. Ins. Co. v. Hauslein*, 60 Ill. 521; *Franklin Sav. Institution v. Central Mut. Fire Ins. Co.*, 119 Mass. 240.

It is contended for appellee, that Felrath can maintain these actions under section 2890 of the Code of 1876, which provides that actions on contracts, express or implied, for the payment of money, must be prosecuted in the name of the party really interested, whether he has the legal title or not. This would undoubtedly be the case, if by the terms of the policy, or assignment pursuant to its terms, the entire sum of the insurance money had been payable to Felrath.—*Appleton Iron Co. v. Br. Amer. Assu. Co.*, 46 Wis. 23; *Keeler v. Niagara Falls Fire Ins. Co.*, 16 Wis. 523. We hold, however, that the right of action on this contract must be determined by the *status* of the transaction, which the parties by their contract have fixed upon it. It is the contract itself, and not any after occurring accident, which determines the intention the parties had. They appointed the payment of a part of the money to Felrath, in case of loss. They did not appoint the payment of the entire sum, nor were the policies assigned. They did not confer on Felrath a right to sue for a part, and on Clark the right to sue for the residue. That would have been to split one contract into two causes of action, which can only be done by agreement of debtor and creditor, having that object in view. It was not done in this case; and the accident that the loss was only partial, and did not exceed the sum appointed to be paid to Felrath, can neither change the contract relations of the parties, nor effect an assignment of the policies. There are a few cases which, it is contended, hold the contrary of these views, but, if they do, we decline to follow them.—*N. W. Mut. Life Ins. Co. v. Germania Fire Ins. Co.*, 40 Wis. 446; *Hammel v. Queen Ins. Co.*, 50 Wis. 240; *State Ins. Co. v. Maackens*, 38 N.

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J. Law, 564. In some of these cases, the appointee's claim equalled, or exceeded the whole sum insured, which, of course, involved no splitting up of the cause of action. This distinguishes such cases from this.—*Watertown Fire Ins. Co. v. Sewing Machine Co.*, 41 Mich. 131.

2. Among the stipulations in each of the policies on which these actions are founded, are the following: That notice and proof shall be forthwith furnished and given of the loss sustained by the fire; that this shall be furnished by the assured himself; that he shall submit himself to be examined on oath, touching the loss and its circumstances, if desired, and that he shall produce a certificate "of a magistrate, notary public, or commissioner of deeds, nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, nor related to the assured, stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured, to the amount which such magistrate, notary public, or commissioner of deeds shall certify." These are stated in the policies as conditions of any right of recovery.

The bills of exceptions state that they contain all the testimony. They do not inform us what proofs of loss were made, nor whether they were accompanied by the requisite certificate of a magistrate, or other named officer. They do inform us the proofs were not made by Clark, the assured, and that he did not submit himself to be examined on oath, when thereto required. He fled the State while the house was burning, and has not since been traced. These alone were fatal to the right of recovery, unless these pre-requisites have been waived. There is no rule of law, nor of public policy, which forbids that parties enter into such stipulations, and when they do, they must abide by their contracts.—*Ala. Gold Life Ins. Co. v. Thomas*, 74 Ala. 578; May on Insurance, § 465; Flanders on Fire Insurance, 523; *Étna Life Ins. Co. v. France*, 91 U. S. 510; *Insurance Co. v. Mowry*, 96 U. S. 544; *Manhattan Life Ins. Co. v. Warwick*, 20 Grat. 614, 656. And the terms of these policies, and Felrath's interest therein, do not relieve the assured of the necessity of making the preliminary proofs by Clark, in whose favor the policies were issued.—*Grosvenor v. Atl. Fire Ins. Co.*, 17 N. Y. 391; *Hale v. Mech. Mut. Ins. Co.*, 6 Gray, 169; *Loring v. Man. Ins. Co.*, 8 Gray, 28; *Franklin Sav. Inst. v. Central Mut. Fire Ins. Co.*, 119 Mass. 240; *Ill. Mut. Fire Ins. Co. v. Fir.* 53 Ill. 151; *Home Mut. Fire Ins. Co. v. Hauslein*, 60 Ill. 521.

3. The remaining question is waiver, *vel non*, of the insufficiency of preliminary proof of loss. On this question the

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testimony is not in harmony. The plaintiff, Felrath, testified that he delivered his proofs to the agent, about a month after the burning. The fire occurred on the 8th February. This would bring the 8th, or later, of March, when the proofs of loss were submitted to the agent. They must then be forwarded to the head office in New York, or, at least, to the general agency for the South—Atlanta—for consideration. Felrath testifies, that the first written notice he received that the proofs were insufficient, was by the letter from the adjusting agent at Atlanta, dated April 27th, 1883, some six weeks, or more, after he alleges the preliminary proofs were forwarded. That letter states a verbal notice had been given on the 18th; and notified Felrath, that "We can not receive the papers served by you as proof of loss in the Clark case, as they are not made out by the assured, as required by the conditions of the policy. We desire proofs in accordance with the policy, and an examination of Mr. Clark, the assured, under oath. I also desire to state, that we decline to accept your proposition to subrogate your claims against the property." This was signed by the adjuster of the insurance companies. Felrath testified, further, that "in the latter part of March, after the fire, the agent and adjuster of the defendants came to Mobile [the place of the burning], and in an interview with him about the fire, and plaintiff's claim on account of it, at the office of Mr. Reese [the local agent for Mobile], Knowles [the adjuster] proposed to plaintiff to transfer his mortgage to defendants, and they would pay him the money on account of the loss; that he, plaintiff, asked time to consider the proposition; that he wished to take advice about it. Knowles said he would call at witness' store the next day, for an answer; that he did not call next day, but called the second day after, and witness told him he would transfer the mortgage, as all he wanted was his money. Knowles then told him he would have to refer the matter back to the companies. Witness further testified, that some time afterwards he was informed that defendants were unwilling to accept his proofs of loss, but that the first and only written notice he received was the letter," copied above.

Felrath was asked, on cross-examination, "if he had received from Mr. Reese, defendants' agent at Mobile, a written notice, stating that the proofs of loss he had spoken of were not satisfactory to defendants, and that they were held subject to his order." And plaintiff answered, "No, he had not received such a notice."

Reese, the Mobile agent, testified, "that he was present when the transfer of the mortgage was talked about between plaintiff and Mr. Knowles; that plaintiff proposed to Mr. Knowles to assign to the companies his mortgage, if they

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would pay him the amount due thereon, and that Mr. Knowles said he would have to refer the matter to the defendants. Witness further testified, that shortly after the interview about the mortgage, he did give the plaintiff the written notice that the plaintiff said he had not received. This notice was handed to plaintiff by witness in plaintiff's store, in the presence of Mr. Levy, a clerk of defendant; that he did not know the date he gave the said notice to Felrath that the proofs of loss were not satisfactory, but that it was some time after the interview about the mortgage at plaintiff's store."

It is thus shown that on two material points, affecting the question of waiver, the testimony is apparently not in harmony.

It is laid down in the books, that when notice and preliminary proofs of loss are served within a reasonable time, then the insurance company must answer within a reasonable time afterwards. If no answer is returned within a reasonable time, or if the answer be a refusal to pay without reference to the insufficiency of the proofs, this is considered a waiver of such insufficiency. If the answer point out certain imperfections or irregularities in the proofs, this is a waiver of all others, no matter how glaring.—*Etna Fire Ins. Co. v. Tyler*, 16 Wend. 385; *Johnson v. Columbia Ins. Co.*, 7 Johns. 315; *Brown v. Kings County Fire Ins. Co.*, 31 How. Pr. 508; *State Ins. Co. v. Mauckens*, 38 N. J. Law, 564; *Aurora Fire and Mar. Ins. Co. v. Krawich*, 36 Mich. 289; *Gr. Wex. Ins. Co. v. Staaden*, 26 Ill. 360; *Ill. Fire Ins. Co. v. Stanton*, 57 Ill. 354; *O'Connor v. Hartford Fire Ins. Co.*, 31 Wis. 160; *Nor. Western Mut. Life Ins. Co. v. Ger. Fire Ins. Co.*, 40 Wis. 446.

4. What is a reasonable time, being a mixed question of law and fact, must always be submitted to the jury, under appropriate instructions. It must depend largely on attendant circumstances. In this case, the distance from the chief agency, the greater distance from the head office, reasonable time to learn all that could be known of the true facts, and to formulate an opinion upon them—each and all of these must be taken into account in prosecuting the inquiry of reasonable time. Like other rules of law, it rests on reason. Insurance companies must not lure their patrons into false security, by which the latter may lose the means and opportunity of remedying defects in their preliminary proof—must not lead them astray by giving notice of one objection, and then relying upon another; nor, by a general refusal to pay, retain in reserve, for a surprise on the trial, some defect in the proof, which, perchance, if known, might have been remedied. The law expects and exacts candor and good faith, and punishes with adverse presumptions those who fail to observe these cardinal

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virtues. The testimony was not so clear and free from conflict, as that the court was justified in giving the general charge.

Reversed and remanded.

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Indictment against Tax Collector for Embezzlement.

1. *Averment as to amount embezzled.*—An indictment against a tax-collector for the embezzlement of public funds, in failing to make returns and forward the tax-money in his hands, from time to time, to the proper authorities, as provided by law (Code, § 4266), must allege some particular sum, or amount, as to which the offense is charged; but it is sufficient to allege that it is “about” a named sum, and it is not necessary to prove the precise sum specified.

2. *Embezzlement by tax-collector; statutory provisions construed as to elements of offense.*—The failure “to make returns and forward the tax-money in his hands, from time to time, to the proper authorities, as provided by law,” as these words are used in the statute (Code, § 4266), “comprises the duty of making monthly reports of collections, and monthly payments of taxes collected, both State and county, in the manner, and at the times specified in sections 417-18;” and this is made a felony, without regard to the amount of default, although the failure to make a final settlement, on or before the first day of May in each year, is only a misdemeanor under section 4265.

3. *Averment of collection, or possession; liability for act of agent.*—To be sufficient as a charge of felony, the indictment must allege, also, that the money was “at the time” in the hands of the tax-collector; since, if collected by a deputy, though the principal might be liable civilly, he would not be liable criminally, unless the money came to his actual possession.

4. *Averment negating “good cause” or excuse.*—The existence of any good cause or excuse for the alleged failure or default is defensive matter only, and it is not necessary that the indictment shall negative it by averment.

5. *“Abstract-book,” and “stub-book;” admissibility as evidence.*—The “abstract-book” of property and polls assessed, which the probate judge is required to make and file with the tax-collector (Code, § 434), is admissible evidence against the collector, when properly identified; and the “stub-book,” required to be kept by the collector himself (Code, § 410), is also competent evidence against him, as an admission of a most solemn character.

6. *Judgment in civil suit; admissibility as evidence in criminal prosecution.*—A judgment recovered against a defaulting tax-collector and his sureties, in a civil action at the suit of the county, is not competent evidence against him in a subsequent criminal prosecution for the default.

FROM the Circuit Court of Hale.

Tried before the Hon. JOHN MOORE.

The indictment in this case contained six counts, each of which charged the defendant, William G. Britton, as tax-

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collector of Hale county, with defaults in his official capacity. The first count charged, that he "did collect money for the county taxes due to said county, and did fail to make returns of said tax-money as collected, and forward the said tax-money to S. W. Chadwick, the treasurer of said county, as provided by law;" the second, that he "did collect money for the taxes due to said county, and did fail to make a return of said money so collected, to S. W. Chadwick, the treasurer of said county, and did fail to forward the said taxes in his hands, to S. W. Chadwick, the treasurer of said county;" the third, that he "did fail to make a written report under oath to S. W. Chadwick, the treasurer of said county, setting forth the amount of money collected by him for the State and county taxes, and did fail to pay to S. W. Chadwick, the treasurer of said county, all the taxes due to said county on account of collections made by him for said county;" the fourth, that, having collected the taxes due the county, he "did fail to make a written report under oath, within the first three days of December, 1882, setting forth the amount of money collected by him for the State of Alabama and said county of Hale, as taxes, during the month of November, 1882, to S. W. Chadwick, the treasurer of said county, and did fail to pay to said Chadwick, treasurer as aforesaid, on the last Saturday of December, A. D. 1882, all the taxes due to the said county of Hale on account of collections made by him during the month of November, A. D. 1882;" the fifth, that, having collected taxes due to said county, he "did fail to make a written report under oath, setting forth the amount of money by him collected for the State and county taxes, to S. W. Chadwick, the treasurer of said county, and did fail to pay to said Chadwick, the treasurer of said county, all the taxes due to said county on account of collections made by him;" and the sixth, that, having collected the taxes due to said county, he "did fail to make a written report under oath, within the first three days of February, 1883, setting forth the amount of money collected by him for the State of Alabama and said county of Hale, as taxes, during the month of January, 1883, to S. W. Chadwick, the treasurer of said county, and did fail to pay to said Chadwick, treasurer as aforesaid, on the last Saturday of January, A. D. 1883, all the taxes due said county of Hale, on account of collections made by him during the month of January, 1883." There was a demurrer to the indictment, specifying several grounds of demurrer, which was overruled by the court; and issue being joined on the plea of not guilty, the jury returned a verdict of "guilty as charged in the indictment," and assessed a fine of five dollars; and the court thereon rendered judgment, overruling a motion in arrest, and sentenced the defendant to

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confinement in the penitentiary for the term of ten months, and to an additional term of hard labor for the county, on non-payment of the fine and costs. The material facts of the case, as involved in the points decided by this court, appear in the opinion of the court.

THOS. R. ROULHAC, for the appellant.—(1.) The indictment is substantially defective in several particulars, as pointed out in the demurrers. It should have negatived, by its averments, the existence of any “good cause or excuse” for the alleged default.—1 Bish. Crim. Pro. §§ 375–78; *Com. v. Hart*, 11 Cush. 130; *Clark v. State*, 19 Ala. 552; *Carson v. State*, 69 Ala. 240; *Grattan v. State*, 71 Ala. 345. It should have specified some particular sum, or “about” a named sum, as the amount of the alleged default.—*Noble v. State*, 59 Ala. 13. It should have alleged that the money was “in his hands,” as the words used in the statute are material; for *non constat* that the money was not collected by a deputy, and never came into the hands of the defendant; in which case, though he might be liable civilly, he would not be criminally. (2.) The assessor’s books and the abstract-books, which were admitted as evidence by the court, ought not to have been received, because they were not certified by the probate judge as required by section 433 of the Code.—Stark. Ev. 399, 10th Amer. ed.; 1 Greenl. Ev. §§ 493, 483–85; *Walker v. Wingfield*, 18 Vesey, 443. (3.) The judgment in the civil suit was not competent evidence.—1 Greenl. Ev. § 537; Stark. Ev. [332]; *Brahan v. Ragland*, 3 Stew. 256. (4.) Some counts of the indictment charged only a misdemeanor, while others were intended to charge a felony; and the verdict of the jury, though general, imposed only a fine of five dollars; yet the court pronounced judgment and sentence of imprisonment in the penitentiary, as for a felony.

T. N. McCLELLAN, Attorney-General, for the State.—(1.) To constitute the statutory felony for which this indictment was found (Code, § 4266), these facts must concur: 1st, the defendant must be a tax-collector; 2d, he must have collected tax-money; 3d, he must fail to report the collection as required by law; 4th, he must fail to pay over the tax-money so collected as required by law. These essential facts are alleged in each count of the indictment, and the objections to it were properly overruled. An averment of the non-existence of good cause or excuse was unnecessary, that being matter of defense; as in the analogous case of an indictment for carrying concealed weapons, which is not required to negative any of the statutory excuses. Nor was it necessary to specify any

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amount, as the amount of the default was entirely immaterial. The averment that the defendant collected tax-money, and has failed to pay it over, is equivalent to an averment that the money is still "in his hands." (2.) The requirement of a certificate by the probate judge to the assessment-book (Code, § 433) is directory merely, and the omission of the certificate neither affects the validity of the assessment, nor impairs the legal status of the book.—*Auditor v. Jackson County*, 65 Ala. 142. (3.) While the judgment itself in the civil suit may not have been competent evidence in this case, it was offered as a part of "the record and proceedings" of that suit; and it is submitted that the defendant's pleas in that case, at least, were admissible as a solemn admission of the facts therein stated, while the objection to the evidence was general.—2 Taylor's Ev. 1112; 18 Mo. 71; 29 Ala. 149; 1 Green. 527; 63 Ala. 138; 52 Ala. 345.

SOMERVILLE, J.—The several counts in the indictment are intended to charge a violation of section 4266 of the Code of 1876, which makes it an embezzlement of the public funds for any tax-collector to "fail to make returns and forward the tax-money in his hands, from time to time, to the proper authorities, as provided by law, except for good cause."—Code 1876, § 4266.

It is objected, both on demurrer, and in arrest of judgment, that the indictment fails to allege the embezzlement of any particular sum of money collected by the defendant as taxes. In the absence of any statutory requirement, the ordinary rule is, that the description of embezzled property must usually be the same as on an indictment for larceny at common law.—2 Bish. Cr. Pro. § 320. The form prescribed by the Code is not so strict, but admits an averment of "about" a specified sum, which, of course, need not be proved precisely as described.—Code, 1876, § 4824; Form No. 50, p. 997; *Lowenthal v. The State*, 32 Ala. 589. In *Noble v. The State*, 59 Ala. 73, we held an indictment for embezzlement to be fatally defective, which merely charged the defendant with converting or applying to his own use "a large sum of money."

It is very true, as argued for the State in this case, that the grade of the offense denounced does not depend upon the amount of the taxes embezzled, as in the case of ordinary embezzlement, or the larceny of money. The conversion by a tax-collector of any appreciable sum of tax-money, evidenced by his failure to make returns and forward such money to the proper officers, as provided by law, unless for good excuse, is a felony, under the provisions of section 4266 of the Code. But it can scarcely be contended, that the failure to make returns

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of, and forward a mere nominal sum—as, for example, a single cent—would be a criminal violation of this statute, although it would clearly come within the letter of it. This diminutive sum would certainly be tax-money, but would be rescued from the operation of the statute upon the principle embodied in the maxim, *De minimis lex non curat*. It would be shocking to justice to construe the law otherwise. There is good reason, therefore, for requiring an averment of some particular amount, which may be described as *about* a certain sum. Bishop's Directions and Forms (1885), §§ 404, 409. The demurrer should have been sustained to each count of the indictment, for this defect.

2. The other grounds of demurrer raise several questions as to the proper construction of sections 4265 and 4266 of the present Code. These sections, together with section 414 of the Code, originally comprised section 8 of the Revenue Code, approved March 6, 1876; Acts 1875-76, p. 61. It is a fact, important to be stated just here, that the tax-collector of each of the counties of this State is required by law to make a written report, under oath, within the first three days of each month, to the county treasurer of the county, or, if there be no such officer, to the judge of probate of the county in which he is collector, "setting forth the amount of money collected by him for the State and county taxes since his last report," and other details not necessary to be here mentioned. The officer to whom he reports is then required to compare the collector's statement with the assessment-book, and forthwith forward a report of it to the State Auditor.—Code, 1876, § 417. And the further requirement is made, that the tax-collector of each county in the State shall, by the last Saturday of each and every month of the year, *pay* to the treasurer of the State all the taxes due to the State, and to the county treasurer all the taxes due the county on account of collections made by him. Code, § 418.

We construe section 4266 of the Code—the one under which the present indictment is designed to be framed—to have reference to the foregoing duties, when it declares that "any tax-collector, who shall fail to *make returns* and *forward the tax-money* in his hands, from time to time, to the proper authorities, as provided by law," except for good cause, shall be guilty of embezzlement, and liable to be punished on conviction as for a felony. The theory of the law clearly is, that, if a tax-collector refuse to make any report of his collections, and to forward the tax-money collected by him, and in his hands, or immediately subject to his control, a conclusive presumption shall prevail, that he has used the money, or converted it to his own use, unless he show some good and sufficient excuse for

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this dereliction of official duty. This, as we have said, is made a felony.

It is made a misdemeanor only, however, by section 4265 of the Code for any tax-collector to fail to pay over all moneys collected by him "in the same character of funds which he received from the tax-payer," or, if he be guilty, as the section further declares, of "violating any of the provisions of section 414" of the Code. This section, among other duties imposed, requires the tax-collector "to *account* to the Auditor, under oath, for the whole amount of State taxes by him collected up to that date," less his commissions, and "on or before the first day of May following [it is further required that] he shall make a *final settlement* with the Auditor, and pay over to the treasurer the balance of the taxes received or collected from the tax-payers in his county." And he is also required "to make a *final settlement*, under oath, with the county treasurer, for all the county taxes, on or before the first day of May in each year."—Code, 1876, § 414; Acts 1875-76, § 8, p. 61. The law-making power had a right to say, that if he failed to comply with these requirements, or any others specified in section 414, a tax-collector should be guilty only of a misdemeanor. This was upon the probable theory, that if he had reported and paid over all taxes collected and in his hands, on the last Saturday of each month, the great temptation to embezzlement, which often occurs from holding large sums of trust funds, would be removed, and with it the presumption of a conversion of any small balance collected between the last Saturday in April and the first day of May, when the final settlement is required, by section 414, with the proper State and county authorities. With the wisdom or policy of the distinction we have nothing to do. We are satisfied that the failure of the tax-collector "to make returns, and forward the tax-money in his hands, from time to time, to the proper authorities, as provided by law," which section 4266 declares to be a felony, comprises the duty of making monthly reports of collections, and monthly payments of taxes collected, both State and county, in the manner and at the times specified in sections 417 and 418 of the Code.

3. It is requisite, in our opinion, that the indictment, in order to charge a felony under section 4266 of the Code, should aver that the money was at the time "in the hands" of the defendant. It may be that he had collected it through a deputy, so as only to create a civil liability upon himself and sureties; and it may never have come into his actual possession, or under his immediate control, so as to be the subject of conversion, or embezzlement. This *status* of the tax-money is

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obviously contemplated by the statute.—Code, 1876, § 4266; Acts, 1875–76, p. 61, § 8.

4. The indictment is not bad, on the ground that it fails to negative the fact that the defendant had no excuse for his neglect to comply with the statute. The language of the section is, “who shall fail to make returns, and forward the tax-money in his hands, from time to time, to the proper authorities, as provided by law, *except for good cause*.”—Code, 1876, § 4266. The offense created is a general one, applicable to all tax-collectors, without exception. It is not limited to any particular class of tax-collectors, or circumscribed by any specified conditions. Nor is there any exception, properly speaking, incorporated in the statute, which constitutes part of the description or definition of the offense.—Whart. Cr. Pl. & Pr. (8th ed.) § 238, and cases cited; 2 Whart. Cr. Law (8th ed.) § 1713. The only cases not coming within the penalty of the statute are excusatory cases—or such as involve a good excuse for doing what the statute says shall not be done. “It would make no matter,” as Mr. Wharton observes, “in such case, whether these excusatory cases be or be not given in the same clause with that prohibiting the general offense; in either case, they need not be negated in the indictment.”—Whart. Cr. Pl. & Pr. (8th ed.) § 240. The case is analogous to an ordinary indictment for murder, in which it has never been supposed that the averments should, by way of anticipation, negative that the deceased was not killed in self-defense, or as an alien enemy *in bello flagrante*. The indictment clearly shows a *prima facie* case against the defendant, without negating the existence of his excuse; and this, apart from the defects to which we have adverted, is all that can be required. 1 Bish. Cr. Proc. (3d ed.), §§ 513a, 631, *et seq.* “For, when such exceptions embrace matter of defense, they are properly to be introduced by the defendant.”—Whart. Cr. Pl. & Pr. § 238.

There is nothing in our own adjudged cases conflicting with the foregoing views.—*Grattan's Case*, 71 Ala. 344; *Carson's Case*, 69 Ala. 235.

5. The “abstract-book,” containing a statement of property and polls assessed, and required by section 434 of the Code to be made out by the judge of probate, and filed in the collector's office, if properly identified, would be admissible against the defendant, who is presumed to be privy to its contents, and to have acted under it in the performance of his official duties. It requires no argument to show that the “stub-book,” which is required by section 410 of the Code to be kept by the collector, is competent evidence against him. It is his own official act, and, as such, an admission of a most

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solemn character. Whether the assessment-list, required to be prepared by the assessor, under the provisions of section 389, would also be admissible, unless corrected by the assessor, and examined by the probate judge, and properly certified by him in accordance with section 433, we need not decide, as the question will not probably arise on another trial of the cause below.

6. The judgment recovered against the defendant and his sureties, in the civil suit instituted against them by the county of Hale, for liabilities incurred in his tax transactions, was not properly admissible in evidence to establish any fact on which it was rendered. In civil actions, juries are authorized to decide on the mere preponderance of the evidence, when it produces satisfactory conviction. In criminal prosecutions, they are not authorized to convict, unless they are satisfied of the party's guilt beyond any reasonable doubt.—1 Greenl. Ev. (14th ed.), § 537. The judgment in the civil cause, moreover, may have been rendered on a state of facts totally irrelevant in a criminal prosecution for embezzlement—as, for example, for a liability incurred by reason of the defalcation of the collector's deputies, or even his own negligent loss of the tax-money, for which he would be civilly but not criminally liable. Another reason still is the want of mutuality, the parties to the two proceedings being different—the judgment having been recovered in the name of the county, and the prosecution being in the name of the State. It would be hard for a defendant, as observed by Mr. Starkie, “that upon a criminal charge, which concerns his liberty, or even his life, he should be bound by any default of his in defending his property.” Starkie's Ev. (Shars.) 300-301 [332].

The other exceptions have been examined, and we are of opinion that they are without merit.

The judgment of the Circuit Court must be reversed, and the cause remanded for another trial. In the meanwhile, the defendant will remain in custody, until discharged by due process of law.

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Action on Policy of Life-Insurance, by Trustee of Beneficiaries.

1. *Proof of mistake ; to what witness may testify.*—A witness who knows that a mistake was made, and by whom made, may state those facts ; but, when it is neither proved nor admitted that a mistake was in fact made, a witness can not be allowed to state, "If any mistake was made, it must have been made by me," this being merely the expression of his opinion as to a conclusion of fact to be drawn by the jury.

2. *Policy of life-insurance ; when representations are warranties ; statements as to age of applicant* —Although warranties are never favored, and will neither be created nor extended by construction ; yet, when declared in express terms in a policy of insurance, the conditions and stipulations must be strictly complied with, without regard to the otherwise immaterial character of the matter to which they relate ; and a representation as to the age of the applicant for a policy of life-insurance, being the basis on which the amount of the premium is computed, is necessarily material.

3. *Same ; statements in application, when made by applicant, or by agent of insurance company.*—When the answers to the questions contained in the printed form of application are written by the agent of the insurer, from his own knowledge or judgment, or from information obtained from third persons, and are untrue, or are incorrectly written down by him from answers truthfully made by the applicant, the insurance company can not take advantage of their falsity or incorrectness, although the policy is based on their truth, and declares them to be warranties ; but, when they are correctly written by the agent from the verbal answers of the applicant, and are afterwards read over to him, and then signed by him, they are his answers and statements, though copied by the agent from memoranda taken by him at the time the verbal answers were made.

4. *Same ; mistakes in answers to questions in application.*—The insurance company can not take advantage of a mistake in the application, when committed by its own agent ; nor can the beneficiaries, suing on the policy, claim that a false statement was made by the assured through mistake, inadvertence, or ignorance, when the statement is declared to be a warranty.

5. *Plaintiff's right to sue ; when and how questioned.*—When the trial was had on the merits, without objection to the plaintiff's right to sue as trustee, his right to maintain the action in that capacity can not be raised for the first time in this court.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WM. E. CLARKE.

This action was brought by T. W. Garner, "as trustee for Eugene G. Wiley and Harry L. Wiley, children of Mrs. Sarah E. Monday, deceased ;" was commenced on the 16th April, 1884, and was founded on a "paid-up" policy of insurance for

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\$488, which the defendant, a domestic corporation, had issued to Mrs. Monday on her own life. The policy was dated the 27th January, 1877; was issued in consideration of the surrender by Mrs. Monday of a former policy held by her, and was made payable "to the children of the insured (T. W. Garner to be trustee, without bond), their executors, administrators, and assigns." The original policy, No. 3,346, the surrender of which constituted the consideration of the policy sued on, was founded on an application in the usual printed form, dated October 3d, 1872, and signed by Mrs. Monday, the assured. In this application it was stated, in answer to direct questions, that Mrs. Monday was born in Georgia, on the 18th January, 1835, and would be thirty-eight years old on her next birth-day; and the application contained a stipulation in these words: "I do hereby agree that this declaration, and the above proposal, shall be the basis of the contract between myself and the said company; and that if any fraudulent or untrue allegation be contained therein, or in the proposal, all moneys which shall have been paid on account of such insurance shall be forfeited to the company, and the policy void." The new policy, on which the action was founded, contained a similar stipulation, which is copied in the opinion of the court. Mrs. Monday died on the 22d August, 1883; and in the undertaker's certificate, accompanying the proofs furnished by plaintiff to the insurance company, it was stated that her age at that time was "49 years, 7 months, and 4 days,"

The defendant filed a special plea, setting out the warranty clause contained in the application, as copied in the opinion of the court, and averring that Mrs. Monday falsely represented her age in said application, whereby the policy was rendered null and void. To this plea the plaintiff filed a general replication, and also a special replication; the latter alleging that the application was filled out by the plaintiff's own agent, through whom the insurance was effected, after Mrs. Monday had signed it, and that she only stated to him, in answer to questions, that she was thirty-eight years old, and that her next birth-day would be January 18th, 1873. The general issue was also pleaded, and the judgment-entry only recites that the cause was tried on issue joined.

On the trial, as appears from the bill of exceptions, the plaintiff read in evidence the policy on which the action was founded, and the application on which the original policy was based; proved the death of Mrs. Monday as above stated, and that the proper notice and proof of death was furnished by him to the defendant, as required by the terms of the policy, within thirty days after her death; the undertaker's certificate being a part of that proof. The plaintiff also offered in evidence the

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deposition of W. H. Carter, the defendant's agent through whom the first policy was effected on October 3, 1872; the substance of whose testimony, as to the circumstances under which the application was made and taken, is stated in the opinion of the court. The 9th direct interrogatory to this witness was in these words: "State fully all other facts you may know, that would be of benefit to the plaintiff, as if specially asked thereabout." The answer to this interrogatory, as copied in the bill of exceptions, was in these words: "*If any mistake was made in her age, it must have been made by me.*" The defendant, when filing cross-interrogatories, objected to this interrogatory, "because the same is too vague and general, and does not give any notice as to what 'other facts' the witness is expected to testify to;" and this objection being renewed when the plaintiff proposed to read the answer as evidence on the trial, the bill of exceptions states that the court "excluded all of said answer except" the words italicized. "The defendant objected to this portion of said answer being read to the jury;" which objection was overruled, and the defendant excepted.

The defendant offered in evidence "the whole of the proof of death, made under oath by plaintiff, and sent to defendant;" which included the plaintiff's own statement that Mrs. Monday was born in Randolph county, Georgia, "on the 18th January, 1834," and the certificate of the undertaker, above mentioned. The plaintiff had taken the deposition of Mrs. Henrietta Marshall, but declined to read it as evidence; and the defendant read from it the answer of said witness to one of the interrogatories, in which she stated that she had Mrs. Monday's "Family Bible," and had seen therein the entry of her birth on the 18th January, 1834. The defendant also read in evidence the deposition of T. G. Davis, the undertaker, who stated that his certificate as to the age of Mrs. Monday was based on the entry of her birth in her "Family Bible," a copy of which he appended to his answer, showing that she was born on the 18th January, 1834. Several exceptions were reserved by the defendant to the rulings of the court on portions of the evidence, which require no special notice.

This being the substance of the evidence, the defendant requested the following charges in writing: (1.) "If the jury believe, from the evidence, that Mrs. Monday signed the application for insurance on her life introduced in evidence by the plaintiff, the plaintiff is bound by the declarations and statements made therein; and if they believe, from the evidence, that she was born on the 18th January, 1834, then they must find for the defendant." (2.) "If the jury believe, from the evidence, that the application made by Mrs. Monday, on which

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is based the policy sued on, shows that she was born on the 18th January, 1835; and they believe, from the evidence before them, that she was born on the 18th January, 1834, then this misrepresentation renders the policy null and void, and they must find for the defendant." (3.) "If the jury believe, from the evidence, that Mrs. Monday was born on the 18th January, 1834, then they must find for the defendant." (4.) "If the jury believe the evidence, they must find for the defendant." As to these charges the bill of exceptions recites: "The court refused to give each of said written charges, to which refusal the defendant excepted."

The refusal of these charges, and the several rulings on evidence to which exceptions were reserved, are now assigned as error.

OVERALL & BESTOR, for appellant.—(1.) By the express terms of the policy, the representation as to the age of the applicant was a warranty; and if her age was therein falsely stated, the policy was void, and no recovery could be had upon it.—*Jeffries v. Life Insurance Co.*, 22 Wallace, 47; *Life Insurance Co. v. France*, 91 U. S. 510. The policy shows the contract between the parties, and its terms must be complied with. *Insurance Co. v. Mowry*, 96 U. S. 544; *Thompson v. Insurance Co.*, 104 U. S. 153; 52 Md. 16; 82 N. Y. 189; *Ala. Gold Life Ins. Co. v. Thomas*, 74 Ala. 578. (2.) The plaintiff's own evidence, submitted under oath, showed that the age of Mrs. Monday was not correctly stated in her application; and although he might not be estopped, yet he adduced no evidence contradicting his own statement under oath, and all the evidence adduced supports it. (3.) If the misrepresentation as to her age was made by Mrs. Monday, though by mistake, the policy is nevertheless avoided, because of the warranty. But there is no proof of any mistake, though the representation is shown to be false, except from the general statement of the defendant's agent, to which objection was made. That statement was mere matter of opinion, and was not competent evidence.—*Perry v. Graham*, 18 Ala. 822; *Sledge v. Scott*, 56 Ala. 202; *Baker v. Trotter*, 73 Ala. 281. (4.) As to the admissibility and effect of the entries in the Bible as evidence, see 2 Phil. Ev. 255. (5.) The plaintiff shows no right of action in himself. The children of Mrs. Monday are the beneficiaries of the policy, and it is shown that one of them is of lawful age.

L. H. FAITH, *contra*.—(1.) The exception to the refusal of the charges asked is general, and can not be sustained if one of them was properly refused.—*Smith v. Sweeney*, 69 Ala. 526; *Stovall v. Fowler*, 72 Ala. 77. (2.) The general charge was properly re-

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fused, because it withdrew from the jury a consideration of all the evidence, and asserted in effect, as matter of law, that Mrs. Monday did make a false representation as to her age; whereas, on all the evidence adduced, the year of her birth was doubtful, and it was doubtful whether the statement contained in the application was made by her. The only evidence contradicting that statement was the entry in the "Family Bible," as it is called; but it was not shown who wrote that entry, or when it was made, and such entries are only received as the "written declarations of deceased persons who made them."—*Cherry v. The State*, 68 Ala. 29; *Bain v. The State*, 61 Ala. 75. (3.) The ninth interrogatory to the witness Carter was proper.—*Newton v. Jackson*, 23 Ala. 335; *Eagle & Phoenix Man. Co. v. Gibson*, 62 Ala. 369. The answer was not obnoxious to the general objection urged against it, if that objection can avail at all.—*Pierce v. Jackson*, 56 Ala. 599. But the answer itself was only the statement of a conclusion from several facts. *Grey's Executor v. Mobile Trade Co.*, 55 Ala. 357; *Railroad Co. v. McLendon*, 63 Ala. 266; *Elliott v. Stocks & Brother*, 67 Ala. 290. (4.) If the mistake was in fact made by the defendant's agent, as he admits, the defendant can not take advantage of it.—*Life Insurance Co. v. Mahone*, 21 Wallace, 152; *Insurance Co. v. Wilkinson*, 13 Wallace, 222; Bliss on Life Insurance, §§ 280–91; 64 N. Y. 236, 648; *Insurance Co. v. Cooper*, 50 Penn. St. 331; *Clark v. Insurance Co.*, 40 N. H. 333; 23 Penn. St. 50; 8 W. Va. 474; 9 W. Va. 237. (5.) The plaintiff's right to maintain the action can not be questioned in this court, not having been raised in the court below.—*Strickland v. Burns*, 14 Ala. 511.

CLOPTON, J.—A mistake, and by whom made, are facts to which a witness may testify, if within his knowledge. The fact of a mistake, and knowledge of the person by whom made, are essential to the relevancy and admissibility of the evidence. It is the appropriate office of the jury to draw the conclusion as to the fact of a mistake, and as to the person who committed it, from the circumstances proved, where the witness does not know, as a fact, that any mistake was committed. The answer of the witness, Carter—"If any mistake was made in her age, it was made by me,"—is the mere conclusion or opinion of the witness, based on the mere supposition of a mistake, and should have been excluded. It is competent to prove the facts and circumstances attending the making and preparation of the application of insurance, but the conclusion therefrom must be left to the jury.—*Whizenant v. State*, 71 Ala. 383; *Perry v. Graham*, 18 Ala. 822.

2. The action is brought on a paid-up policy of insurance,
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issued in January, 1877, which was based on a former policy issued in October, 1872; and contains the following provision: "*This policy is issued and accepted upon the following express conditions and agreements: First—That the answers, statements, representations and declarations, contained in, or indorsed upon the application on which policy No. 3346 was based—which application is hereby referred to, and made a part of this contract—are warranted to be true in all respects; and that if that policy was obtained by or through any fraud, misrepresentation, or concealment, or by any false statement, then this policy shall be absolutely null and void.*" The matter of contestation on the trial in the Circuit Court was an alleged untrue statement of the age of the assured in the application for the first policy, and in her declaration made at that time. In the application, her birth-day is given as January 18th, 1835, and her age as thirty-eight at the next birth-day; and in the declaration, she declared that her age, at the time of making her application, did not exceed thirty-eight years.

Under what circumstances representations, which form a part of the contract of insurance, acquire the character of warranties, when not so expressly declared, it is not necessary for us to consider. In the policy sued on, there is an express warranty of the truth of the answers, statements, representations and declarations, contained in, or indorsed upon the application on which the first policy issued, which are made a part of the contract. While warranties are not favored, and will neither be created nor extended by construction, when a warranty is expressly, and in terms declared, its stipulations and conditions must be strictly complied with. The question is disembarassed of any consideration of materiality, the parties having made it material by their agreement.—*Jeffries v. Life Ins. Co.*, 22 Wall. 47; *Aetna Life Ins. Co. v. France Ins. Co.*, 91 U. S. 510. A misrepresentation as to age, however, is material, it being the basis on which the amount of premium is established. *May on Ins.* § 305.

3. It is insisted, that as the agent of defendant wrote and prepared the application, it is not the statement or warranty of the assured, and the plaintiff is not bound thereby. The proposition of counsel would be correct, if it were shown that the insured did not make the answer, and did not know she was doing so when she signed the application; and that the agent, who solicited the insurance, wrote the answer from his own judgment, or from information received from others; or if it were shown that true statements were made, and the agent substituted others, that were untrue; in other words, any facts showing that the answers, statements, or representations complained of, were those of the agent, and not of the assured,

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Ins. Co. v. Wilkinson, 13 Wall. 222; *Ins. Co. v. Mahone*, 21 Wall. 152. But the fact, without more, that the application was written by the agent, from a memorandum of the answers of the assured, it having been afterwards read to and signed by her, does not constitute them the answers or representations of the company. They are in fact, and in law, her answers and representations.

4. No doubt, mistakes sometimes occur, made either by the applicant, or by the agent. If made by the agent, the company will not be permitted to take advantage of the carelessness, inadvertence, or misunderstanding of its own agent, and avoid the policy, the insured being without fault. On the other hand, if the assured made the mistake, the plaintiff will not be allowed to show her mistake, though committed from inadvertence, carelessness, or ignorance, to the detriment of the company. She warrants against her own mistakes in the answers and representations, on which the company acted in issuing the policy. If, therefore, the assured made an untrue representation of her age, whether intentionally or by mistake, the policy will be vitiated. Whatever statement she warranted must be true, as on its truth the validity of the policy, and the liability of the defendant, are dependent.

On the claim of the plaintiff, that her real answers and declarations were true, but that a mistake was made by the agent in writing the application, it is incumbent on him to establish both the mistake and its commission by the agent. As appears from the record, Carter, who was examined by the plaintiff, was the agent who took the application at the store of the plaintiff, which was a small building, and when several others were present making applications; a memorandum was made of the answers to the various questions, as they were severally and successively asked; from this memorandum the agent filled the blanks in the application, at the residence of the plaintiff, where he had a room; afterwards, Mrs. Monday, with others, came to the residence, when the application was read to, and signed by her; and while the witness does not remember what Mrs. Monday said to him about her age, he stated that he intended his memorandum to be truthful, and to follow it. Other than the evidence of this witness, there is no evidence tending to show a mistake on the part of the agent. His testimony does not show that the memorandum was incorrect in any particular, or that he did not correctly fill the blanks in the application.

On the foregoing principles, and the uncontradicted evidence, the court should have given the general affirmative charge requested by the defendant. It is unnecessary to consider the other instructions requested and refused.

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5. The general issue, and a special plea in bar, having been filed, and a trial had on the merits, without objection being made, by plea or otherwise, to the right of the plaintiff to sue in the capacity of trustee, it is too late to raise the question in this court for the first time.

Reversed and remanded.

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Coleman & Carroll v. Merchants' & Mechanics' Bank.

Ancillary Garnishment; Contest of Garnishee's Answer.

1. *Promise to one person, for benefit of another.*—When a person has in his hands money belonging to another, or owes him a debt previously contracted, a request by the creditor that he will pay the money, or any part of it, to a third person to whom he is indebted, or a written order to that effect, without any present valuable consideration, does not change the ownership of the debt or money, and will not support an action by such third person to recover it; but, where the purchaser of goods agrees, at the time of the sale, to pay the purchase-money by satisfying debts due from the vendor to third persons, the promise enures to the benefit of those third persons, is supported by a valuable consideration which takes the case out of the statute of frauds, and may be enforced by them by action in their own name; and a creditor of the vendor can not, by garnishment sued out before their acceptance of the promise, intercept the money as belonging to their debtor.

APPEALS from the Circuit Court of Pike.

Tried before the Hon. JOHN P. HUBBARD.

These two cases, presenting the same facts, and involving the same question, were argued and submitted together. In each case, the action was commenced by summons and complaint, in favor of Hatcher & Brannon, and the Merchants' & Mechanics' Bank, respectively, against Tatum Brothers and R. J. Higgins; and in each case a garnishment was sued out against Coleman & Carroll, partners, as the debtors of said defendants, which was served on them on the 14th November, 1882. The garnishees appeared, and filed an answer, which was contested by the plaintiffs; and an issue being thereupon made up between the parties, the following facts were agreed on, as recited in the bill of exceptions: "Plaintiffs' debt was against Tatum Brothers, and R. J. Higgins as indorsee,

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Tatum Brothers were merchants in Troy, having a large stock of goods; and they transferred and delivered the same to said Higgins, in payment of the amount due by them to him, and also to secure him against loss on his indorsements to plaintiffs and others. The amount so due by Tatum Brothers was greater than the value of the stock of goods. Within two or three days after such transfer, and on the 13th November, 1882, Higgins offered to sell the stock of goods to Carroll & Coleman, who stated to him that they had a large stock on hand, and also a stock which they had bought at a bankrupt sale; and as it was then late in the fall, and their notes were coming due, they could not, for these reasons, pay for the goods in cash, if they agreed to purchase. Higgins thereupon stated, that he owed H. M. Comer & Co., of Savannah, \$1,000, and Comer was then in town; that he also owed about the same amount to Miss Freeman, which was not due, and about \$1,300 to Joel Carter, which was not due; and that he would sell them the stock of goods, if they would arrange to pay H. M. Comer & Co., and also pay Miss Freeman and said Carter out of the purchase-money, when their debts were presented. It was thereupon agreed between them, that Coleman & Carroll should purchase the stock of goods at seventy cents on the dollar of the cost price and freight, and should pay said Comer & Co. out of the purchase-money, and also the debts to Freeman and Carter; and the sale was made upon these terms and conditions. An inventory was taken, and it was ascertained and agreed that the amount to be paid by Coleman & Carroll was \$3,576.67. Out of this amount, Coleman & Carroll paid Comer & Co., by giving him their check for \$1,000, which was done before the garnishment was served. The trade was made on Saturday, and the inventory completed on that day; and the garnishment was served on the following Monday, and the amount added up and ascertained later on that day. The debt to Miss Freeman was a note for \$735, which became due on the 1st January, 1883; and the debt to Carter was a note for \$1,319, which became due on the 1st October, 1883. Coleman & Carroll paid said notes after they became due, and after the garnishment was served. The garnishment was served before either Miss Freeman or Carter had any notice of the sale of the stock of goods, or of the arrangement to pay their claims, and before either of them had assented to the same, and before Coleman & Carroll had seen either of them, or promised them to pay their debts. The amount due by Coleman & Carroll, at the time the garnishment was served, was \$2,596.67; and the amount due, after deducting the Freeman and Carter debts, is \$522.67. At the time of the sale, said Higgins was indebted to Coleman &

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Carroll, by open account, in the sum of \$188.32; and after deducting this sum from the amount due for the stock at the time the garnishment was served, the balance due by them would be \$2,358.35, or \$334.36 after deducting the Freeman and Carter debts. At the time of the sale of the goods to Coleman & Carroll, Higgins was in failing circumstances, though Coleman & Carroll had no notice of the fact; and they were perfectly good and solvent; which facts were known to Joel Carter."

This being all the evidence in the case, the court charged the jury, on the request of the plaintiffs, that they must find for the plaintiffs, if they believed the evidence. The garnishees excepted to this charge, and they here assign it as error.

P. O. HARPER, for the appellants.—The contract between Coleman & Carroll and Higgins was supported by a sufficient consideration, was valid and legal, and was fully executed before the service of the garnishment. By its terms, a present right of action vested in Carter and Freeman, their assent being presumed; and the subsequent service of the garnishment can neither affect their rights, nor impair the validity of the contract.—Drake on Attachments, 517; *Railroad Co. v. Wheeler*, 18 Md. 372; *Owen v. Estes*, 5 Mass. 330; *Lundie v. Bradford*, 26 Ala. 512; *Watkins v. Pope*, 38 Geo. 514; *Hitchcock v. Lukens*, 8 Porter, 303; *McKenzie v. Jackson*, 4 Ala. 230; *Neilson v. Blight*, 1 John. Cas. 205; *Hale v. Marston*, 17 Mass. 575; *Payne v. Mayor of Mobile*, 4 Ala. 333; *Lovely v. Caldwell*, 4 Ala. 684; *Weston v. Barker*, 12 Johns. 276; *Henry v. Murphy & Co.*, 54 Ala. 251; *Huckabee v. May*, 14 Ala. 263; *Bohannon v. Pope*, 42 Maine, 93; *Kinnard v. Thompson*, 12 Ala. 487; *Hoyt, Ford & Robinson v. Murphy*, 18 Ala. 316; *Lanier v. Driver*, 24 Ala. 249; *Lockwood v. Nelson*, 16 Ala. 294; *Halleck v. Bush*, 1 Amer. Dec. 60; *Skipwith v. Cunningham*, 8 Leigh, 271; *Morton v. Nayler*, 1 Hill, 538.

M. N. CARLISLE, and JOHN PEABODY, *contra*.—To defeat the garnishment, the assent of Carter and Freeman to the arrangement made between their debtor and Coleman & Carroll, before the service of the garnishment, was necessary.—*Baker v. Moody*, 1 Ala. 315; *Clark v. Cilley*, 36 Ala. 652; *Mosley v. Hildreth*, 22 Ala. 469; *Henry v. Murphy*, 54 Ala. 246; *Loan Asso. v. Weems*, 69 Ala. 584; Drake on Attachments, §§ 525-6; *People v. Johnson*, 14 Illinois, 342; *Center v. McQuesten*, 18 Kansas, 476; *Hearn v. Foster*, 21 Texas, 401; *Kelly v. Roberts*, 40 N. Y. 432; *Mayor v. National Bank*, 51 Geo. 325; *Redd v. Burns*, 58 Geo. 574; *Cushman v. Hayes*, 20

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Pick. 132; *Woodbridge v. Perkins*, 3 Day, 364; *National Bank v. Bullock*, 120 Mass. 86; *Mansard v. Daly*, 114 Mass. 408; *Brown v. Foster*, 4 Cush. 214; *Botsford v. Simmons*, 32 Mich. 352; *Briggs v. Block*, 18 Mo. 281; *McCord v. Beatty*, 12 Iowa, 299; 7 Mo. 62.

STONE, C. J.—The undisputed facts of this case are, that Tatum Brothers sold to Higgins their stock of merchandise, in payment of a debt they owed him, and of liabilities for which he was their surety. No question is raised as to the fact and good faith of this sale. Higgins owed H. M. Comer & Co. one thousand dollars, owed Miss Freeman seven hundred and thirty-five dollars, to fall due January 1st, 1883, and owed Joel Carter thirteen hundred and nineteen dollars, to mature October 1, 1883. About November 13, 1882, Higgins sold said stock of merchandise to Coleman & Carroll, at a price which exceeded by some three hundred and thirty-four dollars the sum of the three debts above described, and a small debt due from him to Coleman & Carroll. The agreed terms of the sale were, that Coleman & Carroll were to pay Comer & Co. the debt due them, and were to pay Miss Freeman and Joel Carter the said debts due them when they severally matured, and were to set off and cancel the debt due them from Higgins. This left undisposed of by any agreement the *residuum* of three hundred and thirty-four dollars, an undisputed debt from Coleman & Carroll to Higgins. The debt to Comer & Co. was paid presently, and there is no controversy as to the rightfulness of that payment. Neither is any question raised as to the *bona fides* of the sale from Higgins to Coleman & Carroll. Before either Miss Freeman or Carter had notice of the arrangement, and before they had agreed, or could have agreed to look to Coleman & Carroll as their debtors, instead of Higgins, the garnishments in the present suits were served on Coleman & Carroll as the supposed debtors of said Higgins. The sole question in these cases is, who has the better right to the money, Carter and Miss Freeman, or the attaching creditors? And this question resolves itself into another: Did the agreement between Higgins and Coleman & Carroll vest in Carter and Miss Freeman the ownership, *pro tanto*, of the unpaid purchase-money of the merchandise? The Circuit Court decided this question in favor of the attaching creditors.

There is a clearly settled and well established line of adjudication, that when one has moneys in the hands of another, or that other owes him a debt previously contracted, a mere request preferred by the first to the depository or debtor to pay the money, or any part of it, to a third person, without any present, valuable consideration therefor, does not change the

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ownership of the money, nor give to such third person a right to sue and recover it. And the same rule obtains when, instead of a request preferred to the depositary or debtor, a written order, check or draft is given, but not accepted, requesting or directing such payments to the third person. Such request, until payment, and such order or draft, until acceptance or payment, are revocable at the option of the one who prefers the one, or gives the other. Many sound reasons uphold this rule, but we need not state them.—*Clark v. Cilley*, 36 Ala. 652; *Anderson v. Davis*, 31 Amer. Dec. 612; *Tudor v. Perkins*, 3 Day, 364; *Cushman v. Haynes*, 20 Pick. 132; *Brown v. Foster*, 4 Cush. 214; *Mansard v. Daly*, 114 Mass. 408; *Sproule v. McNulty*, 7 Mo. 62; *Briggs v. Block*, 18 Mo. 281; *Mayer v. Chat. National Bank*, 51 Ga. 325; *Center v. McQuesten*, 18 Kans. 476; *Williams, Deacon & Co. v. Jones*, at the present term; *Kelly v. Roberts*, 40 N. Y. 432.

The rule, however, is different, when, as in this case, it is part and parcel of the contract of sale and delivery, that the purchase-price shall not be paid to the party making the sale, and from whom the consideration moves, but to a third person. In such case, there is a present-moving consideration of value, which takes the case without the influence of the statute of frauds; and it does not matter that the consideration moves from one, and the promise is made to another. Benefit to the promisor is, equally with detriment to the promisee, a sufficient consideration to uphold a promise.—*Dunbar v. Smith*, 66 Ala. 490; *Westmoreland v. Porter*, 75 Ala. 452; *Rutledge v. Townsend*, 38 Ala. 706. In *Young v. Hawkins*, 74 Ala. 370, Hawkins was indebted to Payne by promissory note for part purchase of lands. Hawkins then sold the lands to Young, and in part purchase Young agreed to pay the note which Hawkins owed Payne, and which had become the property of another. Young then sold the lands to Hood, who also promised in part purchase to pay the said Hawkins' note to Payne, unpaid in the first purchase. In this state of the case, and without paying the said note he had given to Payne, Hawkins filed a bill against Young and Hood, and sought to subject the lands to the unpaid obligation they had each incurred to pay the said Hawkins note given to Payne. The holder of that note was not made a party. We decided he could not recover, without first paying the Payne note. We said: "It can not be denied that, if Hawkins, after making the sale to Young, had extinguished the liability on the note Young had promised to pay, Young, and probably Hood, would have thereby become liable to pay the money to Hawkins, and he could then have maintained a bill against the two, and against the land. So, Mrs. Waters, or whoever may be the rightful

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owner of Hawkins' unpaid purchase-money note, may maintain a bill against Young and Hood and the land, on the promises to pay that note given in the several purchases made of Hawkins' allotted interest in the land. But, to maintain a bill by Hawkins alone, on the state of facts first above supposed, it is necessary to aver the special facts which re-vest in Hawkins the right to demand and receive the money. This, because Young was not required to promise, and did not promise to pay the money to Hawkins. The consideration moved from Hawkins, and the promise was made to him ; but the promise was to pay the money to the holder of the note, and it was procured to be so made by Hawkins himself." The principle settled by this case is, that by having the promise made, as part of the contract, to pay the money to the holder of the note Hawkins gave in his purchase, he, Hawkins, disabled himself to assert ownership of the debt created in the Young purchase, unless he had either paid the original debt himself, or the holder of the note, being apprised of the arrangement, had repudiated it, and elected to look alone to Hawkins for payment.

In *Bohannon v. Pope*, 42 Me. 93, it was decided that, "Where, by simple contract, a party stipulates, for a valuable consideration, with another, to pay money, or do some beneficial act for a third person, the latter, if there be no objection other than a want of privity between the parties, may maintain an action for the breach of such engagement. But, if such third person elect, as he may do, to seek his remedy directly against the party with whom his contract primarily exists, there is an implied abandonment of the other remedy. The two remedies are not concurrent, but elective." In *Neilson v. Blight*, 1 Johns. Cas. 205, it was said : "Where a trust is created for the benefit of a person [it was to pay money in this case], though without his knowledge at the time, he may affirm the trust, and enforce its execution." In *Lawrence v. Fox*, 20 N. Y. 268, it was said : "An action lies on a promise made by defendant, upon valid consideration, to a third person, for the benefit of the plaintiff, although the plaintiff was not privy to the consideration." And so, in *Watkins v. Pope*, 38 Ga. 514, the ruling was, that "When A sold to B a stock of merchandise, in consideration that B would pay a certain debt of five hundred dollars due by A, to which B was surety, and in further consideration that B would pay the debts due by A for the stock of goods, which amounted to fifteen hundred dollars, the mode of payment became a part of the consideration ; and even as to the fifteen hundred dollars, A had no right of action against B, until the latter failed, or delayed unreasonably, to pay the debts due by A for the stock of

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goods."—*Weston v. Barker*, 12 John. 267; *Morton v. Naylor*, 1 Hill, (N. Y.) 583; *Halleck v. Bush*, 2 Root, 26; *Merrills v. Swift*, 18 Conn. 257; *Hall v. Marston*, 17 Mass. 574; *Brewer v. Dyer*, 7 Cush. 337; *B. & O. R. R. Co. v. Wheeler*, 18 Md. 372; *Skipwith v. Cunningham*, 8 Leigh, 271; *Botsford v. Simmons*, 32 Mich. 352; *Ward v. Jewett*, 37 Amer. Dec. 115; *Stockard v. Stockard*, 46 Amer. Dec. 79; *Lady Superior v. McNamara*, 49 Amer. Dec. 184; *Tindall v. Touchbury*, *Id.* 637.

The difference between the two classes of cases is, that in the one there is no present-moving valuable consideration to support the request, or promise; in the other there is.

The present case falls within the class second above considered, and the promise imposed on Coleman & Carroll a binding, primary obligation to pay to Carter and Miss Freeman their several demands, from the moment the promise was made, without any reference to any knowledge the latter may have had that the contract had been entered into. True, this relation of debtor and creditor would be changed, if Carter and Miss Freeman, on being notified of it, renounced the provision made for them; or, Coleman & Carroll failing to pay, if Higgins had himself paid these debts. Till one of these events happened, Coleman & Carroll were not debtors to Higgins, except for the excess over and above the sums they promised to pay Carter and Miss Freeman.

Reversed and remanded.

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Ejectment by Remainder-men, against Purchasers from Trustee and Life-Tenants.

1. *Trusts created by deed, for benefit of third persons; whether naked, or active; duration of trust estate.*—An assurance declaring a use, trust, or confidence in land, for the mere benefit of third persons, the trustee being the repository of a naked legal title, having no duties to perform, and subject to no accountability, vests the legal estate in the beneficiaries as if the conveyance were made directly to them (Code, § 2185); but, when a use is declared, or successive uses, which impose active duties on the trustee, in the control, management, or disposition of the property, a legal estate is vested in him commensurate with the scope and extent of the uses or trusts: which estate continues so long as there are any active duties to be performed, or any office in respect to the property to be fulfilled, and ceases with them when the purposes of the trust have been fully accomplished.

2. *Trust deed construed, as to estate of trustee, its duration and termi-*

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nation.—A deed by which the grantor covenanted to stand seized of certain property, real and personal, for uses and purposes as follows: 1st, the payment of all his debts and liabilities then existing; 2d, the joint use of himself and his wife, during their joint lives; one undivided half to be at all times at his sole disposal, and, on the death of his wife, one half of what then remained to be divided as follows—specified sums of money and slaves to be retained and held by him in trust for three grand-children of his wife, children of her three children by a former husband, and the residue of the one half, or its proceeds, to be divided equally among the three children, the interest, or use thereof only, to belong to them during their lives, and at their death to be divided among their children then living,—vests in him the legal title and sole use of one half of the estate, and the primary use of the whole for the payment of his debts; but, after his debts were paid, his active duties as trustee continued only during the lives of the children, who had an equitable life-estate; and on the death of two of the children, after the death of the wife, the trust ceased, and the legal estate in the shares of the deceased children then vested in their respective children, unless the remainder was cut off by a sale pursuant to the terms of the deed.

3. *Trustees appointed by court; extent of powers.*—In the exercise of its jurisdiction over trustees, their appointment and removal, a court of equity may invest its appointees with all the powers requisite for the discharge of the duties of the trust; but it can not confer upon them powers merely discretionary, or powers resting on personal trust and confidence, unless such powers are attached to the office of trustee, or are conferred by the instrument creating the trust on the acting trustee.

4. *Powers; when discretionary, and when imperative.*—A power is discretionary when it is not imperative, or, if imperative, when the time, manner or extent of its execution is left to the discretion of the trustee; and the courts will not, generally, compel the execution of a power which is discretionary, nor review an exercise of the discretion made in good faith; but, when the uses created are imperative, a power of sale conferred for their execution is equally imperative, when its exercise becomes necessary for their consummation.

5. *Deed construed, as to power of sale conferred on trustee.*—In a deed by which the grantor covenants to stand seized of certain property, real and personal, for certain declared uses and purposes (namely, the payment of his debts, the joint use of himself and his wife during life, with further provisions for her children and grandchildren), a power of sale in these words: “And the said John P. N. shall at all times have the sole and absolute right to sell and dispose of the estate hereby conveyed to the uses aforesaid, and on giving adequate security to invest the proceeds according to the terms of this deed,”—does not repose on personal trust and confidence, but is attached to the office of trustee, and intended for the benefit of the trust estate; and it may be exercised by a subsequent trustee, appointed by a court of equity.

6. *Execution of power.*—The intention to execute a power must be manifested, either expressly, or by clear implication; but it may be manifested by an express reference to the instrument creating the power, or, without such reference, by a reference to the property which is the subject of the power; and where the act would be inoperative except as an execution of the power, and is not reasonably susceptible of any other other construction, it will be referred to the power.

7. *Same.*—A deed executed by the trustee in this case, both individually and as trustee, and in which the life-tenants joined, held to be an execution of the power of sale conferred by the instrument creating the trust; it appearing that the trustee had purchased an interest in the property, for the benefit of the trust estate, at a sale made by the register in chancery, and that the sale was confirmed to him as trustee, although the register's deed was made to him individually.

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8. *Same ; presumptions in favor of, arising from lapse of time.*—After the lapse of thirty years (in this case), and uninterrupted possession by the purchaser, the court will make all reasonable presumptions in favor of a due execution of a power of sale, and of the regularity and validity of the conveyance to him, which is not set out, but is described as “sufficient in law to pass the estate and title of the grantors.”

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WM. E. CLARKE.

This action of ejectment, which was commenced on the 24th April, 1882, was brought by Silver M. Gosson and others, grandchildren and great-grandchildren of Mrs. Mary Nicholas, deceased, to recover certain real estate in the city of Mobile, which they claimed as remainder-men under a deed executed on the 26th May, 1836, by John P. Nicholas, then the husband of the said Mary Nicholas. Said deed was signed only by said John P. Nicholas, and attested by two witnesses ; but it purports on its face to be executed by and between him and his said wife, as parties of the first part, and her three children by a former husband, John Baptiste Ramirez, Claudine Gosson and Caroline Martinez, as parties of the second part ; and the consideration is recited to be the natural love and affection of the parties of the first part, for the parties of the second part. By the terms of said deed, the said parties of the first part bargained, sold and conveyed, and acknowledged themselves to stand seized of the real property therein mentioned and described, which included the lands here sued for, and of certain slaves, “to and for the uses and purposes following—that is to say: *First*, to pay all the debts, dues and liabilities now owed by the said Nicholas. *Second*, to stand seized and possessed of the same to the joint use of the said parties of the first part, during their joint lives. *Third*, the one undivided half of the same at all times to be at the sole disposal of the said Nicholas. *Fourth*, in case of the death of the said Mary, then, after paying all the debts as aforesaid, the one half of what shall then remain shall be divided between the said parties of the second part, in manner following—that is to say: 1st. The said Nicholas shall retain and hold in trust for Louis Martinez, son of the said Caroline, one thousand dollars, and one of the said slaves, to be delivered to him when he arrives at the age of twenty-one years. 2d. That the said Nicholas shall retain and hold in trust for Engeline Gosson, daughter of the said Claudine, one thousand dollars in money and a negro woman ; and that the said Nicholas shall retain and hold in trust for Nicholas Ramirez, son of the said John Baptiste Ramirez, a negro woman slave ; which shall all be held by the said Nicholas in trust, and for the benefit of the persons in this behalf named ; and in the event

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they, or each of them, shall die before they attain the age of twenty-one years, the respective portions to be divided between such of their brothers and sisters as shall be living at the time of his or her death ; and if no such brothers and sisters living, then to the father or mother, if living, he or she being the child of the said Mary ; and if none such, then to the next of kin of the said Mary Nicholas living at the time of such death ; and the remainder of the said one half of the said estate, or its proceeds, shall be equally divided between the said parties of the second part, and the interest, or use thereof only, appertain to them during their lives, and at their deaths to be divided between their several children who shall then be living, share and share alike. And the said John P. Nicholas shall at all times have the sole and absolute right to sell and dispose of the estate hereby conveyed to the uses aforesaid, and on giving adequate security to invest the proceeds according to the terms of this deed. And this deed may be revoked, by the joint consent of the said parties of the first part, in the event the said Mary shall recover from her present illness ; and the said Nicholas shall and will, at a more convenient time, execute such conveyances and formal assurances as shall be deemed necessary to carry into effect the true intent and meaning of this instrument."

It seems that Mrs. Mary Nicholas died soon after the execution of this deed, though the record does not state the fact. It was proved that Caroline Martinez, one of the parties named in the deed, died in July, 1878, leaving an only son, who was one of the plaintiffs in the suit ; and that Claudine Gosson died (at what time is not stated), leaving children and grandchildren, who were joined as plaintiffs ; the plaintiffs thus appearing to be the living children of said Caroline and Claudine, and the children of their deceased children. The plaintiffs read in evidence on the trial, as the bill of exceptions states, " the record, proceedings and minute-entries had and made in a certain cause in the Chancery Court at Mobile, copies of which are hereto attached, and made part of this bill of exceptions ;" but these papers were omitted by consent, and, instead thereof, these facts were admitted, as being shown by them : " Said bill was filed on the 21st July, 1836, by W. C. Matlock and Caroline, his wife (formerly Caroline Martinez), Claudine Gosson and her husband, Louis Martinez and Angeline Gosson (now Angeline Graham, one of the plaintiffs), for the purpose of establishing said deed of May 26, 1836, removing said Nicholas from the trusteeship thereby created, and the appointment of a new trustee, and for an account of the property held by said Nicholas under said deed. By the proceedings in said suit, said deed was established, said Nicholas was removed from the trust, and Louis Guerringer appointed trustee in his stead ;

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and a decree was rendered against said Nicholas for a large amount of money, due by reason of his waste of the trust funds, and his undivided one-half in the property was condemned and subjected to the payment of said decree. The property was sold by the register, under this decree, on the first Monday in April, 1847, and was bought by said Guerringer; and the report of sale showed that the purchase was made by him as trustee, though the register's deed was made to him individually, without mentioning that he was trustee, and without in any way designating that he held the property conveyed to him as trustee. Said sale was duly confirmed by the court, by an order and decree rendered on the 12th April, 1847," which, after reciting that the register had filed his report of the sale, therein stating that, "at said sale, Louis Guerringer, trustee, became the purchaser for the sum of \$660," of which sum, after deducting the costs, \$565.15 remained to be applied to the satisfaction of complainants' decree, it was ordered and adjudged "that the same be in all things confirmed, and that the defendant's equity of redemption in and to said premises be forever barred and foreclosed, and that the purchaser be let into possession "

On the 28th March, 1838, said John P. Nicholas signed a *supersedeas* bond as surety for one Collins, who sued out a writ of error to the Supreme Court on a judgment which had been recovered against him; and the judgment having been affirmed, an execution was regularly issued against the sureties on said bond, and was levied on the lands conveyed by said deed, as the property of said Nicholas. At the sale under the execution, Drury Thompson, Reuben A. Lewis and J. Eslava became the purchasers, and they received a deed from the sheriff, which was dated April 1st, 1844. Said purchasers then instituted actions of ejectment against said W. C. Matlock, Claudine Gosson, and other persons, who were in possession as their tenants; and they recovered judgments in said actions, on which a writ of *hab. fac. poss.* was issued, and they were put in possession by the sheriff "in the latter part of 1844, or early part of 1845." There was proof, also, "tending to show that said Thompson, Lewis and Eslava continued in possession, claiming title against all persons, until they sold and conveyed to James H. Daughdrill, who continued in possession, claiming title against all persons, until they sold and conveyed to the several defendants."

"On the 13th April, 1848, while said chancery cause was still on the docket, said Guerringer filed a petition in said court, for an order to award a writ of possession, to turn said Thompson, Lewis and Eslava out of the possession of said lands, and to let him into the possession thereof; and an answer to the petition was filed by said Thompson, Lewis and Eslava, setting

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up their title to the whole of said land under said sheriff's deed, and their recovery of said lands by said judgments in ejectment, as above stated; but said chancery cause does not show that any order was made on said petition and answer, or that any writ of possession issued thereon; and said chancery cause was finally disposed of by an order made and entered on the 13th April, 1852," in these words: "The continuance heretofore taken is set aside, and the matters in controversy in this cause having been settled by agreement between the parties, it is ordered that the cause be stricken from the docket, and each party is ordered to pay his own costs; for which execution may issue." The terms of this compromise are nowhere stated; but, on the 30th January, 1852, a deed for the lands was executed to said Thompson, Lewis and Eslava, "by said Guerringer, individually, and as trustee for the parties therein named, and by said W. C. Matlock, Caroline (his wife), Claudine Gosson, Thomas Graham, Angelina Graham, and Louis Martinez; said Angelina Graham being a daughter of said Caroline, and she and her husband (said Thomas Graham) being parties to this suit." This deed was offered in evidence by the defendants, and the bill of exceptions states that a copy of it is annexed as an exhibit; but, by agreement entered of record, all the deeds and other exhibits are omitted from the transcript, and this admission is made in reference to them: "It is admitted that the several deeds read in evidence by the defendants are, each and all, duly executed deeds of conveyance by the grantors therein, conveying the lands now sued for, and were all duly recorded within twelve months after their respective dates, and are sufficient in law to pass the estate and title of the grantors therein to the lands sued for." The deeds executed by said Thompson, Lewis and Eslava, to James H. Daughdrill, were all executed subsequently to the date of said deed of January 30th, 1852.

Each of the defendants confessed lease, entry and ouster, as to the particular portion of land of which he was in possession, and entered a disclaimer as to the residue of the land sued for; and each pleaded, as to his particular portion, not guilty, and adverse possession for thirty years. On all the evidence adduced, the substance of which is stated above, the court charged the jury, on request, that they must find for the defendants, if they believed the evidence. The plaintiffs excepted to this charge, and they now assign it as error.

G. L. SMITH, for appellants.—1. When the decree was rendered in the chancery suit against Nicholas, the charge then fastened upon the property, and the rights of the parties under

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the decree, dated back to the filing of the bill.—*Evans v. Welch*, 63 Ala. 256. The bill in chancery was pending when the execution against Nicholas was issued and levied, and when the debt was created on which that execution was founded; and the purchasers at the execution sale, obtaining their interest *pendente lite*, take it subject to the charge fastened on the property by the decree.—*Moon v. Crowder*, 72 Ala. 79; *Fish v. Ravessies*, 32 Ala. 451; *Chapman v. Gibbs*, 51 Ala. 502; *Peevey v. Cabaniss*, 70 Ala. 253.

2. The sale under the decree in chancery was made by the court, the register acting only as its agent. Guerringer purchased as trustee, and the sale was confirmed to him as trustee, the amount of his bid being credited on the decree in favor of the trust estate. Guerringer held only as trustee, and could only convey such title and interest as was vested in him in that capacity. By the terms of the deed of trust, Guerringer was trustee only of the life-estate, and the remainder was unincumbered by any trust.—*Schaffer v. Lavaretta*, 57 Ala. 14; *Comby v. McMichael*, 19 Ala. 570; *McBrayer v. Cariker*, 64 Ala. 50; *Greenwood v. Coleman*, 31 Ala. 153; *Grimball v. Patton*, 70 Ala. 626; *Bercy v. Lavaretta*, 63 Ala. 380; *Banks v. Jones*, 50 Ala. 480.

3. The sale and conveyance by the tenants for life, and by the trustee representing them, could have no effect on the title of the remainder-men; nor could it become adverse to them, until after the termination of the particular estate.—Code, § 2191; *Pope v. Pickett*, 66 Ala. 491; *Pickett v. Pope*, 74 Ala. 122; *Mattheers v. McDade*, 72 Ala. 377; *Gilbert v. Pinson*, 57 Ala. 35; *Woodson v. Smith*, 1 Head, Tenn. 276; *Gibson v. Payne*, 37 Miss. 164; 4 Johns. 398; 40 Ill. 260; 10 Bosw. N. Y. 100. The action was brought within ten years after the termination of the life-estate.

4. The discretionary power of sale reserved to Nicholas by the deed, was a matter of personal trust and confidence, and did not pass to Guerringer, his successor by appointment of the court.—2 Perry on Trusts, § 499; 1 Sugden on Powers, 209, 211.

5. If Guerringer had such power of sale under the deed of Nicholas, it was not exercised by his conveyance in compromise of the pending suit, in which the life-tenants joined. All the facts negative the presumption invoked as arising from lapse of time, and show that the parties to the compromise intended to convey their own interest.

OVERALL & BESTOR, and L. H. FAITH, *contra*.—1. The deed of Nicholas did not create a dry and naked trust, but imposed active duties upon the trustee. He was required to sell the

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land, pay the debts of the grantor, and divide the proceeds among the tenants for life; and again, after their death, to divide the remainder among the contingent remainder-men. 2 Perry on Trusts, §§ 498, 766; Hill on Trustees, 471; *Zabriskie v. Railroad Co.*, 33 N. J. Eq. 22; *Hamilton v. Insurance Co.*, 3 Tenn. Ch. 124; *Kirkland v. Cox*, 94 Ill. 400; 2 Brick. Dig. 496. The active duties imposed on the trustee prevented the union of the legal and equitable title in the beneficiaries in remainder.—*You v. Flinn*, 34 Ala. 409; *Pittman v. Conniff*, 52 Ala. 83. The trust has not yet terminated, because Mrs. Angelina Graham, one of the life-tenants, is still living, and is joined as a plaintiff in the action.

2. The sale and conveyance by the trustee, during the continuance of his title and estate, discharged the land from the trust, and forever defeated the merger of the legal and equitable estate in the remainder-men.—*McBrayer v. Cariker*, 64 Ala. 50; *Matthews v. McDade*, 72 Ala. 377; Fearne on Remainders, 326. After the lapse of more than twenty years, during which period the purchaser has held continuous adverse possession under the conveyance of the trustee, all reasonable presumptions will be indulged in favor of the regularity of his action.—*Matthews v. McDade*, 72 Ala. 377.

3. Although the trustee may have had no power to sell, or his sale and conveyance may have been irregular, yet the plaintiffs are barred from a recovery by the statute of limitations and lapse of time.—*Molton v. Henderson*, 62 Ala. 432; *Clark v. Snodgrass*, 66 Ala. 243; *Smilie v. Biffle*, 2 Penn. St. 52; *Herndon v. Pratt*, 6 Jones Eq. 327; *Williams v. Otey*, 8 Humph. 563; *Woolbridge v. Pl. Bank*, 1 Sneed, 297; *Long v. Cason*, 4 Rich. Eq. 60; *Bryan v. Weems*, 29 Ala. 423; *Fleming v. Gilmer*, 35 Ala. 66; 81 Ill. 436; *Hughes v. Farmer*, 58 Geo. 324; *Bright v. Bright*, 59 Tenn. 109; 5 Mo. App. 267; Tiff. & B. on Trusts, 619; Fearne on Remainders, 326.

CLOPTON, J.—An assurance, declaring a use, trust, or confidence of land, for the mere benefit of third persons—the trustee being the repository of a naked legal title, having no duties to perform, and subject to no accountability—vests the legal estate in the beneficiary, to the same extent as if the conveyance had been made directly to him. The legal and equitable estates are merged by the operation of the statute of uses, and no estate or interest vests in the trustee.—*You v. Flinn*, 34 Ala. 409. When a use, or successive uses are declared, which impose active duties on the trustee, in the control, management, or disposition of the trust property, or in other respects, a legal estate, commensurate with the scope and ex-

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tent of the uses or trusts, is vested in the trustee. The extent and duration of his estate are determined by the object and extent of the trusts upon which the estate is given. It continues as long as there are any active duties to be performed, or any office in respect to the property to be fulfilled; but ceases on the cessation of the duties and office. When the purposes of the trusts have been fully accomplished, all having been done necessary to their complete execution, there no longer remains any trust; the estate of the trustee terminates, and the equitable estate of the beneficial owner, if in *esse*, is converted into a legal estate.—*Schaffer v. Lavaretta*, 57 Ala. 14; *McBrayer v. Cariker*, 64 Ala. 50; *Grimball v. Patton*, 70 Ala. 626; *Yarnell's Appeal*, 70 Penn. St. 335.

In 1 Perry on Trusts, § 320, the author observes: "Where an estate is given to trustees, and their heirs, in trust to pay the income to A. during her life, and at her decease to hold the same for the use of her children, or her heirs, or for the use of other persons named, the trust ceases upon the death of A., for the reason that it remains no longer an active trust; the statute of uses immediately executes the use in those who are limited to take it after the death of A., and the trustees cease to have anything in the estate,—not because the court has abridged their estate to the extent of the trust, but because, having the fee or legal estate, the statute of uses has executed it in the *cestui que trust*." The policy and purpose of the statute are to remedy the evil and inconvenience of a separation of the legal and equitable estates, and to consummate their merger, as soon as such union is practicable, consistently with the intention of the grantor, as expressed in the conveyance.

2. By the deed, Nicholas, the grantor, covenanted to stand seized of real and personal property for uses and purposes as follows: The payment of all debts and liabilities then owed by him; the joint use of himself and his wife, during their joint lives; one undivided half to be at all times at his sole disposal; and in the event of the death of his wife, one half of what shall then remain to be divided in manner following: specified sums of money and slaves to be retained and held by him in trust for designated individuals, and the *residuum* of the one half, or its proceeds, to be divided equally between three named children of his wife; the interest or use thereof only to appertain to them during their lives, and at their deaths to be divided between their several children who shall be then living. As to one half of the estate, the legal title and sole use were retained and reserved by the grantor, and the primary use of the whole was vested in him for the purpose of paying his debts and liabilities. After this was effected, other active duties were imposed on the trustee, which continued during the

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lives of the children, who had an equitable life-estate. The *corpus* of the estate remained vested in the trustee, the life-tenants being entitled only to the interest or use. But the active duties of the trustee continued only during the life-estates. When they fell, the trust fell with them. The trustee had no right or power to hold for the use of the remaindermen. As to them, he had no duties to perform, and no office to fulfill,—not even to convey. They were in by virtue of the deed.

It is insisted, that the statute can not operate until the death of all the life-tenants, and that one of them is still living. This is untenable. The deed contemplates and provides for a *division* between the life-tenants at the death of their mother, and after payment of his debts, so that each should take a separate portion; and must be construed as if its provisions had been complied with. A failure in this respect can not change the legal effect of the deed. The wife of the grantor having died soon after the execution of the conveyance, on the death of two of the life-tenants, the legal estate in their several portions was vested in their respective children who were living, if nothing has occurred to cut off the remainder. The remaindermen were then ascertained, and the preservation of the trust was not necessary for this purpose.

3. The grantor, after the death of his wife, repudiated the trust, and asserted a hostile holding. Thereupon, the life-tenants brought their bill in the Chancery Court, to establish the trust deed, to remove him from the trusteeship, and to have a successor appointed. In the progress of the suit, a decree was made removing the grantor, and appointing a new trustee, with all the powers conferred by the deed, and with power to dispose of the property as the deed provides. A court of equity, though having jurisdiction to remove old, and appoint new trustees, can not confer on its appointees powers merely discretionary, or powers resting on personal trust and confidence, unless the deed creating the trusts confers them on the acting trustee, or they attach to the office; but the court may invest its appointees with all the powers requisite for the discharge of the duties of the trust.—Hill on Trusts, 316. Among the powers conferred by the deed is the following: "*And the said John P. Nicholas shall at all times have the sole and absolute right to sell and dispose of the estate hereby conveyed to the uses aforesaid, and on giving adequate security to invest the proceeds according to the terms of this deed.*"

4. A power is discretionary, when it is not imperative; or, if imperative, when the time, or manner, or extent of its execution is left to the discretion of the donee. Generally, the courts will not compel the execution of discretionary powers,

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nor review the discretion, when exercised in good faith. The nature and character of the uses created by the deed were such as to render the necessity of a sale probable, either for the payment of the debts of the grantor, or for a division, on the death of his wife, in the manner provided by the deed. Two thousand dollars in money, and specified personal property, were to be retained, in trust for certain beneficiaries, and the remainder of the estate, "*or its proceeds*" were to be equally divided between the life-tenants. To realize this money, or to make an equitable division of the *residuum*, a sale of the *corpus* of the estate might become necessary. If necessary for either purpose, a court of equity would compel the exercise of the power, on the refusal of the trustee to sell, or direct a sale. The uses created are imperative; and a power of sale conferred for the execution of the uses, where its exercise becomes necessary to their consummation, is equally imperative. It is appendant to, and an integral part of the trust. Perry says: "At the present day, a trust, that is, a power imperative, whether a bare power or a power coupled with an interest, would equally be carried into execution in courts of equity; for the maxim now is, that 'the trust or power imperative is the estate.' And it is well settled, that even in trusts reposed in trustees by name, the survivor, *if he takes the estate* with a duty annexed to it, can execute the power; and the rule of survivorship now applies not only to trusts, or powers imperative, which are construed as trusts, but also to such discretionary powers as are annexed to the office of trustee, and are intended to form an integral part of it."—2 Perry on Trusts, § 505. A power which survives by devolution of law, a court of equity may confer on new trustees.

5. It will be observed that the power of sale is not conferred upon a third person, but on the grantor himself, which has some significance in determining its character. The terms, "*the sole and absolute right*," were meant to exclude any inference of the right of the *cestuis que trust*, or any of them, to interfere, or direct, or control in any manner. If they are construed to intend that no other person, under any circumstances, shall have the power, and that it can not devolve on a succeeding trustee, in case of his death, resignation or removal, the prohibition would extend equally to the power "*to dispose of*" the estate in any manner; for "*the sole and absolute right at all times*" applies to the power to "*dispose of*," as well as the power to sell. The uses might be thereby embarrassingly obstructed, if not defeated. The power is qualified and explained by the words "*to the uses aforesaid*;" that is, the right to sell is conferred for the purpose of discharging and executing the uses created by the deed. No discretion or judgment

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is authorized as to the manner of investing the proceeds. They are to be invested according to the terms of the deed, and to make this sure, adequate security is required. The idea of personal trust and confidence is excluded. It rather seems that the grantor, of course not doubting his own honesty, intended, by the requisition of precedent adequate security, to guard and protect the estate in the possession and under the control of a succeeding trustee, if there should be one. The power of sale does not repose on personal trust and confidence. Although conferred by name, it is annexed to the office of trustee.

6. The defendants claim under a sale and conveyance made by Guerringer, the substituted trustee, in January, 1852. It is insisted, that the sale and conveyance were not made in the execution of the power, and are not referable to it. The intention to execute a power, it is said, must be manifest, either expressly or by clear implication, but need not appear by express reference to the power. In *Blagge v. Miles* (1 Story, 426), Judge Story says: "Three classes of cases have been held to be sufficient demonstrations of an intended execution of a power: (1.) Where there has been some reference in the will or other instrument to the power; (2.) Or a reference to the property, which is the subject on which it is to be executed; (3.) Or where the provision in the will or other instrument, executed by the donee of the power, would otherwise be ineffectual, or a mere nullity; in other words, it would have no operation, except as an execution of the power." The transaction must not be reasonably susceptible of any other interpretation, than as an intended execution of the power.

7. The deed is not before us, and we have no means of ascertaining whether it does or does not contain an express reference to the power. It may be that we would, if necessary to sustain the rulings of the primary court, presume that it contained such reference. The record shows that the deed is in reference to the property, which is the subject on which the power is to be executed, and was executed by Guerringer individually and as *trustee*, and by the life-tenants. The half interest reserved by the grantor was sold in 1844 under execution, and purchased by the persons under whom the defendants claim. The same half interest was subsequently sold in 1847, by the register, under the decree of the Chancery Court, and purchased by the trustee, Guerringer, for the benefit of the trust estate. The sale was confirmed to him as trustee, but the deed by the register was made to him individually. Hence, due caution and protection required a deed from him, as an individual, and as trustee. As *trustee*, the deed is inoperative, except as an execution of the power. If not intended as an execution, why

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was it made by Guerringer as *trustee*, and why did the life-tenants join in its execution?

When the bill was filed by the life-tenants, to establish the trust deed, and appoint a new trustee, the event had occurred, on the happening of which the deed required a division to be made. A controversy arose between the purchasers at the sheriff's sale, and the new trustee, as to the title and possession of the realty, which continued until a compromise was effected in 1852. It is contended that the sale and conveyance were made in the consummation of this compromise. Concede it. There is no charge of fraud, or collusion, or bad faith in the matter of the compromise, and it was recognized by the Chancery Court, which at that time had jurisdiction of the trust property. Under these circumstances, it must be presumed that the settlement of the pending and protracted litigation subserved the interests of the trust estate, and of the *cestui's que trust*. If a compromise of the controversy was necessary, to enable the trustee to discharge his duties, and to execute the uses, and a sale was necessary for this purpose, this is a circumstance,—an act,—showing an intention to execute the power.

8. The record recites, that the conveyance is sufficient in law to pass the *estate* and *title* of the grantors therein. The estate and title of Guerringer were what he acquired by virtue of the register's sale, and under the original deed by reason of his substitution as trustee. The conveyance by him was made in January, 1852. More than thirty years elapsed after the making of the conveyance, before the commencement of this suit; during all which time, the defendants and those under whom they claimed have been in open, notorious, and adverse possession, claiming title. The period of time had expired, after which it is the policy of the law to quiet past transactions, and when the courts will indulge for this purpose all reasonable presumptions. After such a lapse of time, and such uninterrupted possession, it is permissible to invoke the rule of presumption in favor of a due execution of the power of sale, and of the regularity and validity of a conveyance, sufficient in law to pass the estate and title of the grantor—*Matthews v. McDade*, 72 Ala. 377.

On the case made by the record, the remainder was cut off, and the legal title did not vest in the plaintiffs.

Affirmed.

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Statutory Claim Suit, between Vendor and Sub-Purchaser.

1. *Fraud by purchaser, in buying goods ; rights of seller.*—Where goods are obtained on credit by an insolvent purchaser, with no intention or reasonable expectation of paying for them, and without disclosing to the seller his financial status, the fraud vitiates the sale, and the seller may recover the goods, except from a sub-purchaser for valuable consideration without notice.

2. *To what witness may testify.*—The seller of the goods, testifying as a witness for himself, in a controversy with a sub-purchaser, can not be allowed to state that “he believed the purchaser to be solvent, and would not have sold the goods if he had known of his insolvency.”

3. *Same ; general reputation.*—The seller’s ignorance of the purchaser’s insolvency is competent evidence for him, on an issue involving his right to reclaim the goods on the ground of fraud, as his knowledge of that fact would be competent evidence against him ; yet he can not be allowed to state, while testifying as a witness, that “from general report he understood” that the purchaser was solvent.

4. *When title passes to purchaser of goods ; delivery to common carrier.* When a purchaser of goods, having previously ordered them, requests the seller to deliver them to some specified carrier for him, a delivery to that carrier is equivalent to a delivery to the purchaser himself ; but, when the seller, on delivering the goods to a carrier for transportation, takes the bill of lading in his own name, the title is retained in himself, and does not pass without an assignment of the bill of lading.

5. *Same ; assignment and delivery of bill of lading, or deposit in mail.*—If the seller takes the bill of lading in his own name, and afterwards transfers and delivers it to the purchaser, the title to the goods thereby passes to and vests in the purchaser ; and if he deposits it in the mail, assigned and directed to the purchaser, the delivery takes effect from that day, notwithstanding the miscarriage and loss of the paper ; nor is a duplicate necessary to perfect the title of the purchaser in such case.

6. *Proof of purchaser’s insolvency ; subsequent admissions or declarations.*—The insolvency of the purchaser, at the time the contract was made, can not be proved by his admissions or declarations made subsequently to a transfer of the goods ; and his sworn answer to a bill in chancery, to which the transferee or claimant was not a party, is, as to the latter, *res inter alios*, and not competent evidence.

7. *Proof of insolvency.*—Insolvency to-day does not, generally, prove insolvency a week or ten days before ; but it is a fact to which the jury may look, in connection with other facts (such as the disparity between the debtor’s assets and his liabilities), in determining whether the insolvency did not exist at the former day.

APPEAL from the Circuit Court of Barbour.

Tried before the Hon. H. C. SPEAKE.

The appellees in this case, wholesale dealers and manufacturers of flour in the city of Montgomery, instituted a statutory

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action of detinue on the 14th of October, 1884, against Benjamin J. Chitty, to recover forty-one barrels of flour, which they had sold to one L. Manasses, a retail merchant doing business at Clayton. The flour was claimed by several persons; McCormick & Richardson, the appellants in this case, claiming eleven barrels, making affidavit, and giving bond for the trial of the right of property. On the trial of the claim suit, as appears from a bill of exceptions reserved by the claimants, Joseph, one of the plaintiffs, testified that, "on the 23d September, 1884, or a short time previous, plaintiffs received an order by mail from said L. Manasses for a car-load of flour; that the letter contained no statement as to his financial condition, but was simply an order for a car-load of flour, of the kind he had been principally purchasing from them; that on said 23d September, 1884, in accordance with said order, he placed eighty-five barrels of flour on the cars at Montgomery, to be shipped to Clayton, on a credit; that the flour was shipped to plaintiffs' own order, and an indorsed bill of lading was that day mailed to said L. Manasses; that the flour was shipped to their own order, for the purpose of getting for Manasses' benefit the reduced rate of freight over the railroad, which, as they understood, was given to manufacturers, but not to retail dealers." This bill of lading was not received by Manasses, and another was mailed to him by plaintiffs on the 1st October. Said Joseph further testified, "that Manasses had been dealing with plaintiffs' house for years, and had met his bills promptly; that his *understanding* as to the financial condition of said Manasses, at all times during this transaction, was that he was solvent; that Manasses never informed them of his condition, nor had they inquired of him, or otherwise, as to his solvency, but that *from general report they understood him to be solvent*. The claimants objected to the witness stating his understanding, and also to his stating that they understood from general report that said Manasses was solvent;" and they duly excepted to the overruling of their objection. Said witness having further stated, on cross-examination, "that they sold the flour to said Manasses on faith of the credit he had established with them by his previous transactions, together with their belief that he was solvent;" the court allowed him to state, on re-examination in rebuttal, "that he sold the flour to said Manasses because he believed him to be solvent, and would not have sold if he had known of such insolvency;" and to the admission of this evidence an exception was reserved by the claimants. The plaintiffs introduced, also, "evidence tending to show that said Manasses was insolvent at the date he ordered said flour, and at the time he received it; and for the purpose of showing his insolvency at the date of the purchase,

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and at the receipt of the flour, read in evidence his sworn answer to a bill in equity in the United States Circuit Court at Montgomery, in which he admitted his insolvency for years past." The claimants duly objected and excepted to the admission of this answer as evidence.

The court charged the jury, *ex mero motu*, "that the shipping of the flour by plaintiffs to their own order kept and reserved the title in them, and Manasses' right to the possession of the flour and his title therein did not accrue until he got possession of the indorsed bill of lading; and if the evidence satisfied the jury that at time [?] Manasses had no intention or reasonable expectation of paying for the flour, they must find for the plaintiffs." The claimants excepted to this charge, and requested the following charges: (1.) "The purchase of the flour was complete, when the buyer and the seller agreed upon the sale; and although the goods may have been shipped to the order of the seller, as testified, for the purpose of getting reduced rates, yet they belonged to Manasses, and passed title to him, so far as determining when the purchase was made." (2.) "The fraud alleged must be shown to have been committed at the time the goods were purchased; that is, if Manasses had a fraudulent intent which would avoid the sale, that intent must have existed at the time the seller and purchaser agreed to the sale." (4.) "The fact that Manasses was insolvent on the 1st, 2d, or 3d day of October, does not prove that he was insolvent on the 23d September previously."* The court refused each of these charges, and the claimants excepted to their refusal.

The several rulings of the court on the evidence, the charge given, and the refusal of the several charges asked, are now assigned as error.

J. M. WHITE, for the appellants.—(1.) The court erred in admitting the testimony of Joseph which was objected to. *Wilson v. State*, 73 Ala. 527; *Peak v. Stout*, 8 Ala. 647; *Whizenant v. State*, 71 Ala. 383; *Brewer v. Watson*, 71 Ala. 299. (2.) The answer of Manasses to the bill in chancery was not competent evidence against the claimants, being *res inter alios acta* as to them.—*Armstrong v. Harper*, 65 Ala. 523; *Horton v. Smith*, 8 Ala. 73. (3.) The title to the goods passed to the purchaser, at least, when the indorsed bill of lading was deposited in the mail; and the plaintiffs could not avoid the sale, unless there was a fraudulent intent on the part of the purchaser at the time the contract was consummated.—*Flash Brothers v. Loeb & Brother*, 65 Ala. 527; *Pilgreen v. The State*, 71 Ala. 368; 1 Parsons on Contracts, 6th ed., 525; Benjamin on Sales, 3d Amer. ed., § 181.

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E. P. MORRISSETT, *contra*.—The plaintiffs' right of action is founded on the fraud practiced on them by Manasses, and is supported by the case of *Flash Brothers v. Loeb & Brother*, 65 Ala. 527, and the authorities therein cited. The claimants do not set up any purchase by them for valuable consideration without notice, but stand only on the title of Manasses himself; and any evidence which would be good as against him, is equally admissible against them.—Greenl. Ev. §§ 178, 180, 189. That the answer of Manasses to the bill in chancery was competent evidence against him, can not be doubted.—*Hallett & Walker v. O'Brien*, 1 Ala. 585; *Callan v. McDaniel*, 72 Ala. 103; *McLemore v. Nuckolls*, 37 Ala. 662. The charges given by the court were correct.—*Deroe v. Brandt*, 53 N. Y.; *Loeb & Brother v. Flash Brothers*, 65 Ala. 527; 42 Amer. Rep. 53, and cases cited; Benjamin on Sales, §§ 443-4, and notes; *Fulton Insurance Co. v. Goodman*, 32 Ala. 108. The first charge asked was properly refused, because it assumes that the flour belonged to Manasses as soon as it was shipped, when there was no evidence as to the terms of the sale. The second charge asked confined the question of fraud to the time when the goods were ordered, and withdrew from the consideration of the jury the evidence of fraud in his taking possession of the goods at the depot.—*Reese v. Beck*, 24 Ala. 652; *Edgar v. McArn*, 22 Ala. 813; *Upson v. Raiford*, 29 Ala. 188; *Savery v. Moore*, 71 Ala. 237. The last charge asked was calculated to mislead the jury, unless qualified or explained, and was, for that reason, properly refused.—1 Brick. Dig. 339, §§ 59-65.

SOMERVILLE, J.—The action is one of detinue, instituted by the appellees, against one Chitty, to recover certain barrels of flour; the appellants intervening, under the statute, as claimants of a portion of the property sued for, which appears to be eleven barrels. The whole case resolves itself into one of an alleged fraudulent purchase of the goods from appellees, Joseph & Anderson, by one Manasses, upon whose title the claimants stand, without any pretence of being purchasers for value, without notice. The plaintiffs base their right of recovery upon the theory, that Manasses was insolvent at the time he made the purchase, and obtained the goods on credit, with no intention or reasonable expectation of paying for them, and without disclosing to the appellees the *status* of his financial condition. It is not contended, if these facts are true, that the plaintiffs can not successfully maintain a recovery, under the authority of *Loeb & Bro. v. Flash Bros.*, 65 Ala. 526, 538.

2. The judgment of the Circuit Court must be reversed, for one or more erroneous rulings. It was error to allow the witness Joseph, who was one of the plaintiffs, to testify that he

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sold the flour to the purchaser because he *believed* him to be solvent, and that "he would not have sold had he known of such insolvency." Matters of fact, rather than mere belief, were proper subjects of testimony to be elicited from the witness; and the issue for investigation involved what the witness had actually done, rather than what he might have done under a certain state of facts. It is well settled in this State, whatever the rule may be elsewhere, that witnesses are not permitted to testify to their motive, belief, or intention, when secret and uncommunicated; such mental *status*, when relevant, being a matter of inference to be determined from the circumstances of the case by the jury.—*Wheless v. Rhodes*, 70 Ala. 419; *Whizenant v. The State*, 71 Ala. 383; *Burke v. The State*, 71 Ala. 377; *Brewer v. Watson*, *Ib.* 299.

3. It was competent to prove the plaintiffs' ignorance or knowledge of the failing circumstances or insolvent condition of Manasses at the time he made the purchase of the flour. It was error, however, to allow Joseph to state that his firm "understood" him to be solvent "from general report." The evidence does not fall within the rule, that when a fact is shown once to exist, it is competent to prove a general reputation, or common report of its existence, in the business community where the party in question resided, in order to impute a probable knowledge of such fact to such party.—*Humes v. O'Bryan*, 74 Ala. 64, 81; *Stallings v. The State*, 33 Ala. 425; 1 Whart. Ev. § 252. There is no evidence tending to show that Manasses was ever financially solvent, other than the alleged rumors. Rumors of a false report are not admissible to prove one's ignorance of the truth.

4. The chief point of inquiry is, when was the sale of the flour complete, so as to pass the title to the purchaser. In our opinion, the facts in evidence show, *prima facie*, that there was a constructive delivery on the twenty-third day of September, 1884,—when the indorsed bill of lading was put in the mail, directed to Manasses at Clayton. The delivery of the goods to the common carrier, it is true, was not, in this case, a delivery to the consignee. This principle applies in cases where the buyer, having previously ordered the goods, requests the seller to deliver them to some particular carrier, who is thus constituted the agent of the consignee to receive them. *Pilgreen v. The State*, 71 Ala. 368, was a case of this character. Here, the bill of lading, taken from the railroad company by the shippers, was made out to their order; and this operated very clearly to retain the title in themselves, by indicating an intention that it should not pass to the consignee without an assignment of this "document of title," as it is often denominated. The indorsement and delivery of the bill of lading, however, in the

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absence of all fraud, would vest the right of property and ownership of the merchandise comprised in its terms in the indorsee, and, where such indorsee is a purchaser, would complete the sale from the moment of the delivery of such muniment of title.—3 Add. Contr. § 1291; *Farmers' National Bank v. Logan*, 74 N. Y. 568; Anson on Contr. 216.* The delivery of the bill of lading, thus indorsed or assigned, would operate as a constructive delivery of the goods, upon a principle analogous to that which often makes the indorsement and delivery of a warehouse-receipt evidence the symbolic delivery of property. *Allen v. Maury & Co.*, 66 Ala. 10.

5. The question, then, depends upon when the bill of lading itself must be regarded as delivered. It has been held, that the putting of a deed in the post-office, addressed to the grantee, was a sufficient constructive delivery.—2 Greenl. Ev. § 297; *McKinney v. Rhodes*, 5 Watts, 343. The reason is, that by such act the grantee shows an intention to part with his entire control, or dominion over the instrument, and the acceptance of the grantee is presumed, even in the absence of positive proof, because it confers a benefit or bounty upon him.—*Ex parte Powell*, 73 Ala. 517; *Alexander v. Alexander*, 71 Ala. 235. The mailing of the bill of lading, properly indorsed, and directed to the consignee, was presumptively a parting with the control and dominion over it; the mail-carrier, as it is commonly understood in this country and in England, being the agent of the consignee to receive, rather than of the consignor to transmit mail-matter, in all such cases. In *Hatchett v. Molton*, decided at the present term (76 Ala. 410), where a written contract was deposited in the mail by the promisor, addressed to the promisee, and was afterwards received, it was held to have been a binding contract upon the parties from the day of its delivery in the mail. In *Buffinton v. Curtis*, 15 Mass. 528, it was said by PARKER, C. J., that a bill of lading, indorsed, and put in the post-office, addressed to the indorsee, was a constructive delivery, and from that time passed the property in the goods. In the present case, the first bill of lading, which was mailed to Manasses on the twenty-third of September, 1884, miscarried, and was never received by him. In our opinion, this was unimportant. The transaction does not need any aid from the presumption of his assent to it, for this is expressly proved. The delivery of the instrument was complete from the time of its deposit in the mail, and this operated as a constructive delivery of the goods in controversy. To accomplish this end, the second, or duplicate copy, was not required. The consignee could have brought his action against the carrier, and have recovered without it, on proving the loss of the original in the

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mails. The rulings of the court were in conflict with this phase of the case, and were erroneous.

6. The insolvency of Manasses could not be proved by any declarations or admissions by him, so far subsequent to any transfer of the goods to the claimants as to constitute no part of the *res gestæ* of the transaction. The sworn answer of Manasses in the chancery suit, shown to have been pending in the United States Court, at Montgomery, was a mere admission of such insolvency, and would be *res inter alios acta*, so far as concerns the appellants, if made subsequent to his parting with the title to the property.

7. The court properly refused the fourth charge requested by the appellants, because it tended to mislead the jury. It is true, perhaps, that evidence of one's insolvency to-day can not be said, generally, to prove his insolvency a week, or ten days ago; but it is a fact to which the jury may look, and from which they would be often authorized to infer such previous state of insolvency, according to the particular facts or nature of the case. A commercial bankruptcy or suspension not uncommonly presents such an alarming disparity between the assets and liabilities of the insolvent debtor, as to render it morally certain that an assignment made by him is but the announcement of a pre-existing state of insolvency; just as the death and physical condition of a patient may often afford reasonable grounds for the inference that these are but the culmination of a previous protracted illness.

The judgment of the Circuit Court must be reversed, and the cause remanded.

Home Insurance Co. v. Adler.

Action on Policy of Insurance against Fire, or for Breach of Parol Agreement to Insure.

1. *Verbal agreement to insure; when risk begins.*—A verbal agreement, made in October, to issue a policy of insurance for twelve months in the early part of November, covers a loss occurring on the 19th day of November.

2. *Same; when complete, and sufficient to support action for breach.*—A valid agreement to insure a stock of goods against loss by fire may be made verbally, and an action maintained for the breach thereof, on proof that the substantial provisions of the policy were agreed on between the plaintiff and the defendant's authorized agent, pre-payment of the premium being waived, and some of the details left to the judgment of the agent in filling out the policy; that the parties separated under the mu-

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tual supposition that the contract was complete, and that a policy was afterwards issued, but subsequent to the loss of the goods, in which the details were filled out according to the understanding of the terms by the agent.

APPEAL from the City Court of Selma.

Tried before the Hon. JONA. HARALSON.

This case was before this court, on appeal by the present appellant, at its December term, 1882, and was reported in 71 Ala. 516-28. The action was brought by Max J. Adler, against the Home Insurance Company, which was described as a "body corporate doing business by and through an agent in said county of Dallas;" and was commenced on the 24th July, 1879. The plaintiff sued to recover the agreed value of a stock of goods, which the defendant had insured, or agreed to insure, against loss or damage by fire, and which were destroyed by fire on the morning of November 19th, 1878. The complaint contained several counts on a policy of insurance, and several for the breach of an agreement to insure; and in these different counts, the terms of the policy or agreement were stated in varying language. The original complaint contained six counts, and three were added by amendment after the remandment of the cause on the former appeal; the third amended count being in these words: "And plaintiff, who, at the several times herein mentioned, contracted and carried on business by and under the name of M. J. Adler & Co., and owned and possessed certain goods, wares and merchandise, and certain household furniture, bedding, and family wearing apparel, all contained in a certain building situated in the town of Camden, in Wilcox county, Alabama, of the aggregate value of \$5,000, claims of the said defendant the further sum of \$1,500 as damages, with interest thereon; for that heretofore, to-wit, on the 20th day of October, 1878, the said defendant, for a valuable consideration, undertook, promised and agreed, to and with plaintiff, that it would execute, issue and deliver to plaintiff, in the early part of November, 1878, its certain contract of insurance in writing, commonly called a 'fire-insurance policy,' in and for the sum of \$1,500, payable to said plaintiff, and thereby insure against loss or damage by fire the said goods, wares and merchandise, to the amount and extent of \$1,200, and the said household furniture, bedding, and family wearing apparel to the amount and extent of \$300, for the period of one year, beginning in the early part of November, 1879, to-wit, on the 5th day of November, 1879. And plaintiff avers, that said defendant wholly omitted, neglected and failed to execute, issue and deliver to said plaintiff the fire-insurance policy aforesaid, and thereby to insure said goods, wares and merchandise, and said household furniture, bedding, and family wearing apparel,

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for the period of one year as aforesaid ; and that afterwards, and during said period of one year, and after the date when, by the terms of said agreement, the said contract of insurance should have been executed, issued, and delivered to plaintiff as aforesaid, the said goods, wares and merchandise, and the said household furniture, bedding, and family wearing apparel, were, to-wit, on the 19th day of November, 1878, wholly lost and destroyed by fire ; to plaintiff's damage as aforesaid."

The defendant pleaded the general issue, and the cause was tried on issue joined on that plea ; a jury being waived, and the cause submitted to the decision of the presiding judge. The plaintiff's own deposition was taken in his behalf, and was read in evidence on the trial, and he also examined one S. Sterne as a witness ; while the defendant introduced one Kayser as a witness, the local agent in Selma through whom its business was then conducted, and the deposition of one G. C. Green, the defendant's clerk or book-keeper in New York. The evidence showed that said Kayser, the defendant's agent at Selma, was engaged in other business also at that place, and had private business transactions with the plaintiff, outside of his agency for the defendant ; that the plaintiff had obtained a policy of insurance on his stock of goods from the defendant, through said Kayser, for \$3,000, beginning September 30th, 1876, and continuing for twelve months ; and that on the 5th November, 1877, he procured another policy, for \$2,000, which expired on the 5th November, 1878 ; that the agreed premium, on each of these policies, was $2\frac{1}{2}$ per-cent., and pre-payment was waived, the amount being charged against plaintiff on his general account with Kayser. It was shown, also, that these policies, after their delivery, were deposited in his safe by Kayser, on the request of the plaintiff, for safe-keeping, and that the latter policy was returned to the defendant in New York by Kayser, as being forfeited on account of the non-payment of the premium, and was marked cancelled on the defendant's books in January, 1878. The plaintiff testified that he had no knowledge or notice of the cancellation of this policy, and supposed that it was still in force on the 19th or 20th October, 1878, at the time of the interview and negotiations between him and Kayser for another policy, on which this action is founded ; while Kayser testified, that he had given plaintiff notice several times that he would be compelled to cancel the policy, if the premium was not paid by the first day of January, 1878. As to what occurred at the interview between plaintiff and Kayser, on the 19th or 20th October, 1878, there were several discrepancies in their testimony, as shown by the following extracts :

Plaintiff thus testified : "I was in Selma on the 19th October, 1878, and went there to buy a stock of goods. I am ac-

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quainted with Meyer & Co. of that city, of which Sam. Sterne was then a member. Kayser introduced me to them. I purchased a bill of goods from them on that day amounting to \$919.84, paying \$350 in cash. Mr. Sterne waited on me, and Kayser came in while he was waiting on me. Sterne asked me, if I was insured; and I answered, that I had \$2,000 insurance on my store with Kayser, as agent of the Home Insurance Company of New York. Sterne called Kayser up, and asked him, *'Is Adler insured with you?'* Kayser replied, *'Yes, he is: he has got a \$2,000 policy in the Home Insurance Company of New York.'* The stock of goods I had in my store at Camden were the goods and property referred to. Kayser told Sterne, that my policy would soon expire; but he referred to it as one in existence, and did not say any thing about its cancellation. I told him to renew my policy when it expired; and he said he would do so, and agreed to do so in Sterne's presence. The policy referred to was No. 281. It was that policy he agreed to renew. It was understood that it was to be renewed on the day of its expiration; that it was to be renewed for one year from November 5th, 1878. No demand was made on me for pre-payment of premium for said renewal. I made no other or different agreement with Kayser than that just stated, after that, in regard to insurance. I left Selma on the morning of October 20th, and never saw Kayser again until after the fire."

Sterne thus testified, for plaintiff: "I saw plaintiff in October, 1878, in our store in Selma, and sold him goods amounting to over \$900. Kayser came to our store with him at that time, and said we would be perfectly safe in selling goods to him. On Kayser's assurance that he was all right, I agreed to sell him the goods, for \$300 or \$400 cash, and the balance on credit. After Kayser left, I asked Adler if he was insured; and he said that he was, in the *Home* of New York, represented by Kayser. Kayser came up stairs while I was selling the goods to Adler, and I asked him if Adler was insured, and if his insurance was all right. He answered, that he was sufficiently insured—for \$2,000, I think he said—in the company he represented. Kayser said, that he watched Adler's policies, and attended to them, and renewed them from time to time. This was said in Adler's presence. Adler told Kayser to renew his policies from time to time; and Kayser said he would do it. I do not remember definitely about the amounts; but my recollection is, that it was \$2,000, or \$3,000,—I am not positive which."

Kayser thus testified, for defendant: "When Adler came to Selma, in October, 1878, I directed him to go to Meyer & Co.; and I went to see Sam. Sterne, and told him about Adler—that he was all right, and would pay part cash, and that he

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could give credit for part ; and I told Adler to go over to their store. Sterne asked me, if Adler was insured ; and I told him, *Yes*. When Adler came to our store, I told him that Sterne had asked me if he was insured, and I told him of his carelessness in paying premiums. He said, '*I thought you attended to my insurance ;*' and I answered, '*Yes*.' He said, '*Make me out a policy for \$2,000.*' I told him that was too much—that \$1,500 on his stock and household furniture was enough. He had no policy then. I told him the policy had been cancelled, but if he would remit to me between the 1st and 5th of the next month (November), he could have a policy. He said that did not suit him. I told him that \$1,500 was as much as he was entitled to on all. He left it to me, how much to put on the goods, and how much on the furniture. There was no day stipulated when it was to be done."

It appeared that plaintiff and Kayser never met after this interview, until on the morning of November 20th, 1878, the day after the destruction of the goods by fire, when plaintiff went to Selma, called on Kayser, told him of the fire, and asked for his policy ; whereupon Kayser produced from his safe, and delivered to plaintiff, a policy for \$1,500,—of which \$1,200 was on the stock of goods, and \$300 on the furniture. This policy was dated November 19th, 1878, and was in fact filled up by Kayser after the fire had occurred, but before he had heard of it. Plaintiff inspected this policy, and then returned it to Kayser, to be deposited in his safe ; and it was afterwards returned by Kayser to the defendant. Sterne testified, also, that he asked Kayser about Adler's policy two or three days after the fire, and that Kayser said it was in his safe.

"On all the evidence adduced," the substance of which is above set out, so far as material, the bill of exceptions recites, "the court found as follows: (1.) That there was a parol contract of insurance between the plaintiff and the defendant, entered into, to-wit, on the 20th October, 1878, whereby the defendant agreed to issue to the plaintiff a policy of insurance on the property, for the sums and time as specified in the 3d count of the amended complaint, filed on the 9th June, 1883. (2.) That the premium to be paid thereon was 2½ per-cent. on the value of the property insured, the whole premium being \$37.50, which has never been paid. (3.) That said policy was to issue subject to the condition, that the said company should not be liable, in case of loss, for more than three-fourths of the actual cash value of the property insured immediately before the loss. (4.) That the defendant failed to issue and deliver said policy as it had agreed to do. (5.) That the storehouse, in which said insured property was, was destroyed by fire on the 19th November, 1878. (6.) That the actual cash value of

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the merchandise in said storehouse immediately before the fire, and which was destroyed, was \$3,000; and the actual cash value of the household furniture, &c., immediately before the loss, and which was destroyed, was \$400. (7.) That due notice and proofs of loss were given and made to the defendant, to-wit, on the 29th November, 1878. (8.) That the total amount of said insurance—\$1,200 on merchandise, and \$300 on household furniture, &c.—less the premium unpaid (\$37.50), with interest from the 30th January, 1879, being sixty days after due notice and proofs of loss, is recoverable in this case, as damages for the breach of said parol contract for insurance. And the court thereupon rendered judgment in favor of said plaintiff, and against said defendant, for \$2,077, besides costs."

The defendant excepted to this judgment, and to each of the separate findings on which it was founded; and now assigns the same as error.

PETTUS & DAWSON, for the appellant.

BROOKS & ROY, *contra*.

STONE, C. J.—The testimony in this case reasonably establishes the following propositions of fact: That Kayser was the agent of the appellant corporation, authorized to contract for it, and to assume fire risks in its name; that he and Adler conferred together, and agreed, the latter to take out, and the former to issue a policy of insurance, without pre-payment of premium, and without further negotiation, the one with the other; that the rate of premium, duration of the policy, location of the subject of the insurance, nature of the risk, and substantial details of the policy, were all mutually understood between them; and that they separated with this mutual understanding—the one intending to issue the policy, and the other confidently expecting it would be issued.

We think, also, that the testimony—particularly that which relates to the interview when Sterne was present—justifies the conclusion, that the new policy was to be issued at or soon after the expiration of the old one, or when by its terms it would expire—November 5, 1878. We, therefore, think that a jury, weighing the testimony bearing on this question, would come to the conclusion, that the policy was to be issued early in November, which would fix the agreed date before the property was destroyed by fire; and we should, and do reach the same conclusion.

Adler testified that, according to his understanding, the new, or renewal policy, was to be for two thousand dollars, and entirely on his merchandise. Kayser's testimony is, that the sum

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of the insurance was to be fifteen hundred dollars—twelve hundred on the merchandise, and three hundred on the furniture. On this discrepancy, the argument is made, that there never was a concurrence of the two minds, and, therefore, there never was a contract to insure. We can not assent to this. It is manifest that Kayser thought he had made an agreement to insure. If he had not, he would not, without further instructions, have issued the policy bearing date November 19. And Adler thought there was such agreement, as his remarks to Kayser, when he reached Selma (remarks not denied, but corroborated by Kayser) tend to show. We think the solution and reconciliation of this discrepancy are found in the fact, of which there is some testimony, that while Adler wished to continue his insurance of two thousand dollars, Kayser was unwilling to let it stand above fifteen hundred; and the matter of fixing the amount and placing the risk was left with Kayser, as a friend of the assured. The discrepancy, then, does not prove there was no agreement. It is the common case of antagonist witnesses, differing as to some of the terms of their contract. The appellant succeeded in convincing the court of the correctness of its version, and has no ground of complaint, as to this question. We fully concur with the City Court of Selma in its several findings, and the judgment must be affirmed.

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Action by Water-Works Company, against Municipal Corporation, for Breach of Contract.

1. *Distinction between express and implied contracts.*—Express and implied contracts are alike founded on the actual agreement of the parties, and the only distinction between them lies in the mode of proof.

2. *Contract with corporation for supplying water for use against fire.* Plaintiff having undertaken, by special contract, to supply defendant, a municipal corporation, through fire-plugs, or hydrants, with water for use in the extinguishment of fires, for which defendant agreed to pay a specified price per year, in monthly installments, for each hydrant; a recovery may be had for the agreed price, whether any water was actually used by the defendant or not, if plaintiff kept on hand water of suitable quality, and in quantity sufficient for the prescribed uses.

2. *Same; use of water after termination of contract.*—If the defendant continued, after the termination of such special contract, to use the water in the same manner, and for the same purposes as before, without giving notice of an intention not to submit to the same terms and condi-

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tions, the law would imply a promise to pay the same price fixed by the special contract; and a resolution adopted by the defendant, a copy of which was served on the plaintiff, neither admitting nor denying the special contract, but objecting to the quality and quantity of the water furnished, and declaring that nothing would be paid for the water used until these defects were remedied, does not rebut this implication, when it appears that the defendant continued to use the water as before.

APPEAL from the City Court of Montgomery.

Tried before the Hon. THOS. M. ARRINGTON.

This action was brought by the Montgomery Water Works Company, a private corporation, against the "City Council of Montgomery," a municipal corporation; and was commenced on the 19th July, 1884. The complaint contained the common count, claiming \$700 as due by account on the 1st July, 1884, "for water furnished by plaintiff to supply the fire-plugs in the city of Montgomery during the month of June, 1884;" and a special count as follows: "Plaintiff claims of defendant \$700, due by contract on the 1st July, 1884, with interest thereon; and plaintiff avers that on, to-wit, the first day of January, 1884, defendant agreed to pay plaintiff a large sum, to-wit, \$7,500, for supplying a large number, to-wit, one hundred fire-plugs, owned by the defendant, with water for extinguishing fires in the city of Montgomery during the year 1884; said sum to be paid in monthly installments, to-wit, \$625, on the last day of each month during said year; and defendant paid several installments on, to-wit, the last day in January, February, March, and April, and plaintiff continued to supply said fire-plugs with water for extinguishing fires in said city, during the month of June, in the year 1884; and the water so furnished and supplied by said plaintiff was received by said defendant, and was held in readiness for use, and was used by said defendant, and under its direction, for extinguishing fires in said city; yet the said defendant wholly failed and refused to pay the installment due as aforesaid on, to-wit, the first day of July, 1884, to-wit, the sum of \$625, for water furnished and supplied as aforesaid during said month of June, 1884." The defendant pleaded—1st, "that it did not undertake or promise in manner or form as plaintiff hath alleged against it;" 2d, "that it doth not owe the said sums above demanded, or any part thereof;" and issue was joined on each of these pleas.

"On the trial," as the bill of exceptions states, "there was evidence on the part of the plaintiff showing that plaintiff owned water-works in the city of Montgomery, and had been furnishing water to defendant, for fire purposes, through 97 hydrants up to the 1st day of June, and afterwards 98, belonging to defendant, but connected with plaintiff's water-pipes; that this water had been furnished and paid for, at the rate of \$75 *per annum* for each hydrant, in monthly installments of

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\$6.25 each, and the payments regularly made on the first day of each month, for the preceding month, on bills rendered, up to the 1st May, 1884; that plaintiff, at the end of each month, presented a bill to defendant for the fire-hydrants, at \$6.25 per month for each hydrant which had been accepted by the defendant, and the bills were paid; that this had been done regularly each month, for eight or ten years, prior to the 1st June, 1884; that the bill for May, 1884, had been presented as usual, and the defendant failed to pay it; that no fire-hydrant had ever been paid for by the defendant until the same had been tested by the defendant, and found to be sufficiently supplied with water for fire purposes; that the supply of water had been the same, and the use of it the same in all respects, during the said month of May, and subsequently, as before that time; that no notice was ever given by defendant to plaintiff that said defendant would not pay for the hydrants accepted as aforesaid, except the notice in writing hereinafter mentioned; that defendant had not paid anything on account of water so furnished to fire-plugs for fire purposes, since the payment for the month of April, but had been supplied by plaintiff with water for other purposes, and had paid for such water regularly as other private consumers, the amount so used and paid for being about \$30 per month. And here the plaintiff closed.

"There was evidence on the part of the defendant tending to show that the water furnished to the hydrants by plaintiff, prior to May, 1884, had been furnished and paid for under a contract between the parties; that in May, 1884, the defendant passed a resolution, a copy of which was served on the plaintiff," and which was in these words: "*Whereas* the Montgomery Water Works claim to have a contract with the City Council of Montgomery, to supply the city with water for certain purposes; now, without admitting the validity of any such alleged contract, *be it resolved* by the City Council of Montgomery, that the City Council refuse any longer to pay the Montgomery Water Works for its water, until that company, in the judgment of this council, furnish the city with a sufficiency of water, both in quantity and quality, to supply the water-plugs now located, or which may be hereafter located in the city, with good water; and that the mayor be authorized to serve the Montgomery Water Works with a copy of this resolution."

"There was evidence, also, tending to show that the city of Montgomery contained about 18,000 or 20,000 inhabitants; that only about two-thirds or three-fourths of the city was furnished or supplied with fire-hydrants; that the average consumption of water for fire purposes, when supplied through hydrants, in cities in the United States, was not greater than three gallons per day for each inhabitant; that the price charged for

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water by plaintiff, when furnished to consumers, taking from six to ten thousand gallons daily, was fifteen cents per thousand gallons; and that the reasonable value of the water which would, on an average, be used by a city the size of Montgomery, from hydrants, for the purposes for which they were furnished, and for the uses for which water from them was drawn, during the period of use sued for, would not have been greater than \$270, if the whole city had been served with hydrants; and there was no evidence as to the actual amount of water used from said hydrants, during the period covered by this suit. The defendant introduced, also, evidence tending to show that some fifteen or twenty of the hydrants included in the number which the defendant had been paying for up to the 1st May, 1884, were not sufficiently supplied with water for fire purposes; that the quality of the water was often not good, being muddy and containing sand and gravel, which injured the fire-engines. The witness who testified as to this deficiency of quality and quantity, further testified that he discovered this since January, 1884, when he was appointed to an office in the fire-department which made it his duty to examine and test the fire-plugs; and that he made report of these matters to the defendant, in January, and each month subsequently. There was evidence, also, tending to show that some sixty or seventy of the fire-plugs, for supplying which with water for fire purposes this suit was brought, were connected with the water-mains by three-inch pipes, and that a four-inch pipe is the least that would supply with water a fire-engine, such as those of the defendant; though the plaintiff's evidence tended to show that all of said hydrants were tested and accepted by the defendants before they were ever received and paid for. The evidence showed that there was no notice on the part of the defendant, to the plaintiff, not to supply the fire-hydrants with water, or any other notice than said resolution above named; and there was no evidence of any corporate act on the part of said defendant, after said resolution, in reference to the furnishing of water by plaintiff to said hydrants, or the payment therefor by the defendant; but there was evidence that the defendant paid the drivers of the fire-engines, and fed the horses, but that the fire-companies were voluntary associations, and elected their own officers.

"During the examination of one Baldwin, who was the superintendent of the defendant's water-works, plaintiff asked him, 'if there was any relation between the water actually consumed and the price charged for furnishing hydrants with water for fire protection.' The defendant objected to this question, on the ground that it called for the opinion of the witness on a matter which involved a scientific inquiry, as to which the

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witness was not shown to be qualified to give an opinion; he having previously stated that he had no scientific education, and was not an expert. The court overruled the objection, and allowed the witness to answer the question; to which the defendant excepted. The witness answered, that there was no connection between the two.

“The foregoing was all the evidence in the case; and thereupon the court charged the jury, at the instance of the plaintiff, that if they believed the evidence, they must find a verdict for the plaintiff, for \$627.46, with interest from the first day of July, 1884.” The defendant excepted to this charge, and now assigns it as error, with the admission of the evidence objected to.

GUNTER & BLAKEY, for the appellant.—(1.) There is no controversy here as to the water furnished, at a stipulated price, under an express contract between the parties, while that contract was in force; but the contest is as to the measure of the plaintiff's recovery after the abrogation of that contract—after non-performance of its stipulations by one party, and an express refusal and notice by the other not to be bound by its terms. Every contract, express or implied, rests upon the *consensus mentium* of the parties. While the express contract was in force, plaintiff was entitled to recover the stipulated price, without regard to the quantity of water actually furnished and used; and after the expiration of that contract, the relations between the parties being unchanged, it may be that the law would raise an implied promise to pay at the same price. But no such implication can arise as to water voluntarily furnished by plaintiff after defendant's refusal to pay at that rate for the month of May, and notice that it would pay nothing in future unless the defects complained of were removed.—*Crommelin v. Theiss*, 31 Ala. 418. For water furnished and used under these changed relations, a recovery can only be had under a *quantum valebat*. It must be remembered, too, that the defendant is a municipal corporation, and not only has the right, but it is its duty, as the custodian of the public good, to take and use the water at any time when necessary for the extinguishment of fires, subject only to the obligation of making just compensation.—2 Dill. Mun. Corp., § 756, notes. If an express notice and refusal to pay for one month does not change the course of dealing between the parties, how long must such refusal be persisted in? The stipulated price under the former contract was only evidence for the consideration of the jury, in connection with the evidence offered by the defendant as to the quantity and value of the water actually furnished and used; and the affirmative charge of the court was erroneous. (2.) The price or value of water for protection

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against fire in cities, as in the analogous case of insurance, is governed by the *average* amount actually used by cities for such purposes per each inhabitant; and no other rule can be laid down. Yet the court allowed plaintiff's witness to testify that there was no relation between the two.

TROY & TOMPKINS, *contra*.—The proof showed that plaintiff had been furnishing water to defendant, for fire protection, for a number of years, under a contract entered into between them; but none of the terms of the contract were proved, except the agreed price per month for each hydrant. Notwithstanding the defendant's refusal to pay for the month of May, and resolution not to pay anything in future unless certain alleged defects were remedied, the water was furnished and used as before; and there was no proof that the water was different, in quantity or quality, from that for which the defendant had paid during the whole period. If there was a contract between the parties, and the plaintiff failed to comply with any of its stipulations, that was matter of defense, to be affirmatively shown by the defendant; and in the absence of such evidence, the plaintiff was entitled to recover the price fixed by their former dealings.—2 Greenl. Ev. § 136; *Merrill v. Railroad Co.*, 16 Wendell, 588; *Sewing Machine Co. v. Bulkley*, 48 Illinois, 189; 1 E. D. Smith, 618; *Whilden & Sons v. P. & M. Bank*, 64 Ala. 1; *McKenzie v. Stevens*, 19 Ala. 691. The testimony of Baldwin was directly to the point involved—that the price paid by the defendant had no reference to the quantity of water used. If his evidence was improperly admitted, it was error without injury.—*Leonard v. Storrs*, 31 Ala. 488; *Donley v. Camp*, 22 Ala. 659; 36 Ala. 39.

SOMERVILLE, J.—The evidence discloses, without conflict, that the plaintiff had been furnishing the defendant, for eight or ten years, with water "for fire purposes," through a large number of hydrants; this water being used by the city authorities for the purpose of extinguishing fires, whenever required. No account was kept of the quantity of water consumed for this purpose; but the defendant had paid for this privilege, regularly, the annual sum of seventy-five dollars per hydrant, in monthly installments of six dollars and a quarter per hydrant. This sum had been paid on the first of each month, on bills rendered for the preceding month, based upon the foregoing rates; and these payments had been continued up to the first of May, 1884. The bill for May, being presented on the first of the succeeding month, was refused payment by the defendant, and so with the bill for June; and for the amount of this bill the present action was brought. It

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is further made to appear, that all water used by the city, for other purposes than that of extinguishing fires, was paid for on a *quantum valebat*, at prices charged private consumers. The court gave the general charge, at the request of the plaintiff, on this state of facts; probably considering that the law implied a contract from the facts, and that this implied promise to pay was not abrogated or affected in any manner by a certain resolution of the city council of Montgomery, passed in the month of May, to which we shall advert in the consideration of the questions before us.

Nothing is plainer than the proposition, that the distinction between express contracts and implied contracts lies, not in the nature of the undertaking, but in the mode of proof. As observed by this court in *Keel v. Larkin*, 72 Ala. 493, 502, "both express and implied contracts are founded upon the actual agreement of the parties, the only distinction between them being as to the mode of proof, or evidence by which they are substantiated."—2 Greenl. Ev. § 102. The evidence, in the present case, tended to show that the water furnished the hydrants, prior to the month of May, had been furnished and paid for under a contract between the parties. The terms of this contract not being specially set out, we interpret the bill of exceptions to mean, that they were in harmony with the action of the contracting parties above indicated. The plaintiff declares, both upon a special contract, and upon the common count for water furnished to supply the fire-plugs, or hydrants.

If there was a special agreement on defendant's part to pay a stipulated sum to the plaintiff, for the privilege of using water to extinguish fires, and defendant furnished the requisite amount, of suitable quality for the purposes intended, and this agreement continued in force and unrescinded, there can be no doubt of plaintiff's right to recover under the first count, whether any water was actually consumed or not. And if the special agreement had terminated, and the defendant continued to use the water as before, in the same manner, and for the same purposes, without any notice of intention not to submit to the same terms and conditions, the law would raise an implied promise to pay the rate of recompense fixed by the former contract. The case is not one of a *quantum valebat*. The contract shown by the evidence, whether express or implied, is not one to pay for the quantity of water actually consumed or taken from the hydrants, but an agreement to pay a stipulated sum each month, for the right or privilege of using as much as they needed. The obligation of the plaintiff was, to always have the requisite amount of water in their works, ready for use. If they had fully performed this duty, a recovery could as well

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be had under the common count, as under a special agreement; the presumption being, that the price to be charged would be the contract price.—2 Greenl. Ev. (14th ed.) §§ 104, 136, note 4; *Grover & Baker Sewing Machine Co. v. Bulkley*, 48 Ill. 180; *Wolffe v. Wolffe*, 69 Ala. 540 (44 American Rep. 526).

It is our opinion, that the facts in evidence presumptively established an agreement, whether express or implied it is immaterial, by which the jury, if they believed it, were required to infer a promise by the defendant to pay the plaintiff the sum of six dollars and a quarter for the privilege of using water from the fire-plugs, or hydrants, furnished by them to the city council of Montgomery.

This implication is not rebutted by the resolution of the city council, passed in the month of May, 1884. This resolution, while it does not admit, pointedly fails to deny, the existence of the alleged contract. The objection raised goes rather to the good quality and sufficiency in quantity of the water furnished; and the declaration is, that nothing will be paid for the use of the water until these alleged defects are remedied. There was no notice to the plaintiff not to continue to supply the fire-hydrants with the customary supply of water, and the use of the water by the defendant continued during the months of May and June precisely as before. It does not appear that the quality or quantity of the water had in any manner depreciated, but that it continued the same. If such a defense had been interposed, the burden of proving it would have devolved upon the defendant. Under this state of facts, the continued enjoyment of the benefits of the existing contract must be presumed to be accompanied with its attendant burdens. The defendant knew that the plaintiffs had given no consent to reduce the price of the privilege, and the continuation of the use of the hydrants was their own voluntary act. In such a case, the law presumes an implied agreement to pay the contract price.

We find no error in the rulings of the court on the evidence; and in our judgment, the general charge to find for the plaintiff was properly given.

STONE, C. J.—The resolution of the city council of Montgomery, a copy of which was served on the Montgomery Water Works Company, was in no sense a repudiation of the price charged, and previously paid for the use of the fire-plugs. It was a determination to pay *nothing* to the company for its water, “until that company, in the judgment of the council, furnish the city with a sufficiency of water, both in quantity and quality, to supply the water-plugs now located in the city,

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with good water." The resolution being to pay nothing, its most natural interpretation is, that unless the Water Works raised the supply of water up to the standard which the council termed good, both in quantity and quality, then the city would cease to use the fire-plugs; for it can not be supposed the intention was to use the water, and yet pay nothing for it, because of its inferiority. The rule must be applied, observed in kindred questions, that a specification of particular objections, is a waiver of every thing not expressed. *Inclusio unius est exclusio alterius*. It is like the objection to testimony, or to the preliminary proofs in the case of insured property destroyed by fire, or to the sufficiency of a tender, on specified grounds. In either such case, a specified objection is a waiver of all other objections that might be made, and concedes there is in fact no objection, other than that which is specified.—1 Brick Dig. 887, § 1194; *Firemen's Ins. Co. v. Crandall*, 33 Ala. 9; 2 Greenl. Ev. § 601. The city council, by the course it pursued, must be held to have precluded itself from raising the question of the price it would pay for the use of the fire-plugs, if it used them.

The witness Baldwin, against defendant's objection, was permitted to testify that there was "no relation between the water actually consumed and the price charged for furnishing hydrants with water for fire protection." The present action claimed a recovery, not for any extra water consumed, but for supplying water to a given number of fire-plugs, or hydrants, for fire protection, or for use. Supplying water to hydrants, for use in case of fires, denotes, *ex vi terminorum*, that the Water Works Company bound itself to keep the hydrants supplied with water for use, when needed, and that it can have no relation to the quantity of water that may be needed or used. The testimony, tending as it did to prove only what the law, in its absence, would have inferred from the very terms of the contract, it is immaterial whether the testimony was legal or illegal. It could work no possible injury. Let it be understood, however, that what I have said applies only to this suit, where the only claim made is for so much per hydrant, for keeping them supplied with water for fire purposes. Should there be a claim asserted for water used, not in extinguishing fires, but for some other purposes, my remarks must be construed as deciding nothing on that question.

I fully concur in the conclusions reached by my brother SOMERVILLE.

CLOPTON, J., not sitting.

Proskauer v. People's Savings Bank.

Bill in Equity by Creditor to set aside Fraudulent Conveyances.

1. *Alternative averments, as to consideration of conveyance assailed for fraud.*—In a creditor's bill seeking to set aside a conveyance on the ground of fraud, alternative averments as to the consideration of the deed are permitted, when each averment makes the conveyance fraudulent, and entitles the complainant to the same relief.

2. *Fraudulent conveyance; simulated consideration.*—When the consideration of a conveyance by a debtor is wholly simulated, or is partly simulated for the purpose of approximating the apparent consideration and the real value of the property conveyed, and the conveyance is executed with the intent to prevent the property from being subjected to the debts of the grantor, it is fraudulent and void as against creditors.

3. *Same; antecedent liability as surety on administration bond, as consideration.*—An absolute conveyance by an insolvent or embarrassed debtor to his surety on an administration bond, intended only as a security or indemnity against the surety's antecedent liability, no new or additional liability being contemporaneously incurred, is fraudulent and void as against the existing creditors of the grantor.

4. *Estoppel en pais against creditor by laches, or by accepting fraudulent grantee as indorser.*—A creditor is not estopped from filing a bill to set aside, on the ground of fraud, a conveyance executed by his insolvent debtor, and a subsequent conveyance by the grantee to the debtor's wife, because he delayed for one or two years after the execution of the conveyances, making efforts in the meantime to collect his debt; nor because he renewed his debt after the execution of the conveyances, and accepted the fraudulent grantee as indorser on the renewed note, to the payment of which he seeks to condemn the property conveyed.

5. *Statute of limitations in favor of fraudulent grantee.*—The limitation in favor of a fraudulent grantee of land, against creditors of his grantor, is ten years; and in cases of fraud, the creditor is allowed an additional period of one year after the discovery of the fraud (Code, § 3242); but this is not an exception restricting the general limitation to one year.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 29th August, 1884, by the People's Savings Bank, a domestic corporation located and doing business in the city of Mobile, as a creditor of Adolph Proskauer, against the said Proskauer, his wife, Mrs. Julia Proskauer, and George F. Werborn; and sought to set aside, on the ground of fraud, a conveyance of real estate in the city of Mobile executed by said Proskauer to said Werborn, and a subsequent conveyance of the same property by said Werborn to Mrs. Proskauer, and to subject the property to the satisfaction of the complainant's debt. The bill alleged that said

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Proskauer was indebted to complainant, on the 17th January, 1882, more than fifteen thousand dollars, which indebtedness "has been, from time to time, renewed and extended, small payments being made on account thereof;" that on the 2d February, 1883, he executed and delivered to said bank his promissory note for \$950.66, payable twelve months after date; that on the 4th February, 1884, he executed and delivered to complainant his two promissory notes for \$1,666.66 each, one payable to himself, and the other to said Werborn, both indorsed in blank, and payable six months after date; that these three notes were "so made and delivered in renewal and extension of a part of the aforesaid indebtedness which had been due to complainant from said Proskauer on and before the 17th January, 1882," and that all of said notes were past-due and unpaid when the bill was filed.

The conveyance by Proskauer to Werborn, which the bill sought to set aside, and a copy of which was made an exhibit, was dated the 17th January, 1882; was signed by said Proskauer and his wife, and acknowledged by them, before a notary public, on the 27th January, 1882; conveyed a house and lot in the city of Mobile, which was described as the homestead of the grantors; and recited as its consideration "the sum of five thousand dollars to them in hand paid by said Werborn, and the further consideration that said Werborn has become surety on the bond of said Adolph Proskauer for thirty thousand dollars, as administrator of the estate of — Heinaman, deceased." As to the consideration of this deed, the bill contained the following allegations:

"*Par. 3.* Said Werborn did not pay to said Adolph Proskauer the sum of three thousand dollars, the consideration in said deed mentioned, or any consideration whatever; or, if he did make any payment, that the same was a sum much less than the real value of said property; and your orator shows that, at the time of such pretended sale, said property was really worth, in cash, not less than six thousand dollars. Your orator further shows, that the further consideration in said deed mentioned—namely, that said Werborn had become surety on the administration bond of said Proskauer—was not a valuable consideration to sustain an absolute conveyance of said property; that said Werborn had, in fact, become such surety before the execution of said deed, and there had been no settlement of said administration, and said Werborn had never paid anything on account of the liability incurred by him as such surety; that said Proskauer was, at the time said conveyance was made, largely indebted to parties other than your orator, and was insolvent; that said conveyance was made by him for the purpose of so covering said property as to prevent it from being

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subject to the payment of his debts, and with the intent thereby to hinder, delay or defraud your orator and his other creditors; and that his said object was known to said Werborn, and was participated in by him; and that if said Werborn actually paid a sufficient consideration for such property, he did so with the knowledge of such intent, or with knowledge of facts which charged him with notice thereof. Your orator shows, that said Proskauer, ever since such pretended sale to Werborn, has occupied said property, with his family, as their residence, and still occupies it; that such homestead, after being reduced to its lowest practicable quantity, largely exceeded two thousand dollars in value at the time of its conveyance to said Werborn, and still largely exceeds that value, and that the specific homestead exempted by the constitution and laws of Alabama can not be allotted out of said real estate; and as to all of said property in excess of two thousand dollars in value, your orator charges that said conveyance was fraudulent and void as to your orator, as an existing creditor of said Proskauer."

The deed from said Werborn to Mrs. Julia Proskauer, a copy of which was also made an exhibit to the bill, was dated March 23, 1883, and conveyed the same property, on the consideration, as recited, of one thousand dollars in hand paid, "and the further consideration of the payment of three thousand dollars, with accrued interest, according to the tenor of three negotiable promissory notes, of even date with this instrument, signed by said grantee, and payable to the order of said grantor, at the People's Savings Bank in Mobile, for respectively the sum of one thousand and eighty dollars, payable one year from date; one thousand one hundred and sixty dollars, payable two years from date; and twelve hundred and forty dollars, payable three years from date." As to the consideration of this deed, the bill contained the following allegations:

"*Par. 4.* Your orator further shows, that said conveyance by said Werborn to Mrs. Julia A. Proskauer was made in furtherance of said original fraudulent scheme; that said Julia has never paid anything to said Werborn in consideration of such conveyance, the consideration therein recited being wholly simulated; that if anything was paid to said Werborn, on account thereof, such payment was really made out of funds belonging to said Adolph Proskauer; or, if any payment on account thereof was made out of money belonging to said Julia, that she made such purchase with knowledge of the fraud affecting said Werborn's title to said property, or with notice of such facts as charged her with such knowledge."

A demurrer to the bill was filed by Proskauer and wife, and

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also by Werborn; the causes of demurrer specially assigned, thirteen in number, being substantially as follows: (1.) That the bill showed on its face that the complainant had knowledge of the alleged fraud in the conveyances for more than twelve months before it was filed, and it was therefore barred by the statute of limitations. (2.) That the complainant's renewing and extending Proskauer's indebtedness, and accepting Werborn as indorser on the new notes, with knowledge of the conveyance to him, was a ratification of that conveyance, and estopped the complainant from assailing its validity. (3.) That the allegations as to the consideration of each of the conveyances were inconsistent and incompatible.

The chancellor overruled the demurrer, and his decree is now assigned as error.

D. C. ANDERSON, and F. G. BROMBERG, for appellant.

R. H. CLARKE, *contra*. (No briefs on file.)

CLOPTON, J.—Conceding that a general averment of fraud is insufficient, and that the facts out of which the supposed fraud arises, must be alleged, the bill is not obnoxious to this objection. It alleges facts, which, if true—and the demurrer admits them to be true—characterize both conveyances—the one to Werborn, and the one to Julia Proskauer—as fraudulent against the creditors of Adolph Proskauer; and alleges that the grantees had knowledge of, and participated in the fraud.

The ground of demurrer, that the bill is filed in two incompatible aspects, is founded on a misconception of the frame, character, and purpose of the bill. It is filed by a simple-contract creditor, and its sole purpose is to assail the alleged fraudulent character of the conveyances, and to condemn the property conveyed to the payment of complainant's debt. The allegations as to the consideration are varied, with the view to meet any supposable state of the evidence; but, if either of the alternative allegations is true, the consideration is fraudulent.

The expressed consideration of the deed to Werborn is five thousand dollars paid, and that Werborn has become surety on the bond of the grantor as administrator. The bill avers that no money whatever was paid, or, if any was paid, it was largely less than the real value of the property; and that Werborn had become such surety before the execution of the deed; that there had been no settlement of the administration, and the surety had paid nothing on account of his liability. A consideration wholly simulated, or simulated in part, if inserted for the purpose of increasing the apparent consideration to an

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amount equal to or approximating the value of the property, where the deed is executed with the intent to prevent the property from being subject to the debts of the grantor, as the bill alleges, is fatal to the validity of the deed.—*Tatum v. Hunter*, 14 Ala. 557. The mere fact of having become surety on an antecedent bond is not a valuable consideration, sufficient to sustain an absolute conveyance against the creditors of the grantor, the surety incurring no new, additional, or contemporaneous liability; and an absolute conveyance by an embarrassed debtor, secretly intended to operate as indemnity against an antecedent liability on the administration bond, reserves a benefit or use to the grantor, and is fraudulent as to his existing creditors.—*Sims v. Gaines*, 64 Ala. 392; *Felloes v. Lewis*, 65 Ala. 343. On either of the alternative statements as to the consideration, the complainant is entitled to the same relief, and the same defense is applicable. As to the conveyance to Julia Proskauer, the bill alleges a simulated consideration, or its payment with funds belonging to her husband, the debtor, or payment out of her own money with notice of the fraud affecting the title of her grantor.

Acts or admissions *en pais*, in order to operate an estoppel, must have influenced the conduct of the party setting them up, or alleging them as an estoppel. It can not be seriously contended, that the delay of a creditor to pursue property alleged to have been fraudulently conveyed, for two or three years, in the meantime making efforts to secure or obtain payment of his debt otherwise, estops him from assailing the first, or a supervening fraudulent conveyance, and seeking to subject the property to the payment of his demand; or that he is estopped by renewals of the debt, and accepting the grantee as an indorser, when such indorsement is not made, with the knowledge of the creditor, on the faith of such conveyance having been executed. Before Werborn became such indorser, he had disposed of the property to Julia Proskauer, as the bill alleges, fraudulently; and no inference or intendment arises from the averments of the bill, that the complainant influenced Werborn, in any manner, to become such indorser. The object of the bill is to condemn the property to the payment of the note, in relief of his indorsement.

The limitation which a fraudulent grantee of land may invoke for his protection, against a suit by the creditor of his grantor, is ten years—the period requisite to bar an action for the recovery of the land.—*Lockard v. Nash*, 64 Ala. 385. The statute which, in actions seeking relief on the ground of fraud, allows one year after the discovery of the facts constituting the fraud, within which to prosecute a suit, enlarges the time for the benefit of the creditor, or party complaining of the fraud,

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where the statute has already created a bar; and was not designed, and does not operate, to abridge the time necessary to perfect a bar in favor of the fraudulent grantee.—*Code*, § 3242.

Affirmed, remanded for further proceedings.

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Bill in Equity by Surviving Partner, against Executors of Deceased, for Injunction in matter of Executory Contract of Partnership.

1. *Rights of surviving partner.*—The death of one partner invests the survivor with the exclusive right of possession and management of the whole partnership business and property, including *choses* in action as well as *choses* in possession; but he holds in trust for all persons interested in the partnership—the creditors of the firm, and the representatives of the deceased, as well as for himself—and his duty is to settle and close the concern, without unnecessary delay, in the best manner for all parties interested.

2. *Same.*—Where there are two surviving partners, this right and this duty devolve equally upon both; and a delivery or payment to either is a discharge from all liability or obligation to the other.

3. *Same.*—If the partnership had entered into an executory contract, which was only partially performed at the death of the deceased, his death does not absolve either party from performance, in the absence of an express stipulation to that effect; and the existence of the partnership, with its active functions, to be exercised by the survivor, is continued until the contract has been fully performed.

4. *Remedies, legal and equitable, of surviving partner.*—The partnership having entered into a contract with the deceased partner while living, for the sale to him of a large quantity of lumber, in the manufacture of which the partnership was engaged, to be delivered during a period of several months, as required to fill his private contract with an exporting company; and, on the destruction of the mills of the partnership by fire, after the death of the deceased partner, the survivor having contracted with the owners of another mill for the manufacture and delivery of the lumber necessary to complete the contract; if such sub-contractors fail or refuse to deliver the lumber as stipulated, the survivor may maintain an action against them for the breach; if, ignoring his rights, they deliver the lumber to the executor of the deceased partner, the possession of the latter would be wrongful, and he would be liable personally to the surviving partner for any disposition he might make of the lumber; and if he applied it in part performance of his testator's contract with the exporting company, the surviving partner might maintain an action against the estate of the deceased, as for goods sold and delivered. Hence, having these remedies at law, the surviving partner can not maintain a bill in chancery on these facts, without averring other facts which show the necessity for equitable interference.

5. *Same; injunction pending suit, as determined by relative inconvenience and damage to parties*—In granting or refusing an injunction pending the suit, the court is invested with large discretionary powers, the exercise of which is materially controlled by consideration of the relative

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inconvenience and damage which may result to either party; and where, as here, though continuous breaches of contract are threatened, and consequent damage to the plaintiff, suing as surviving partner, there is no averment that the defendants are insolvent, and the injunction would probably cause greater damage to the executor of the deceased partner, by preventing his performance of the testator's contract, in aid of which the contract with the partnership was made, an injunction ought not to be granted.

APPEAL from the Chancery Court of Conecuh.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 5th January, 1885, by Matthew L. Davis, as the surviving partner of a late partnership alleged to have existed between himself and D. F. Sullivan, deceased, under the name of the *Molino Mills Company*; against Martin H. Sullivan and Mrs. Emily F. Sullivan, as executor and executrix of the last will and testament of said D. F. Sullivan, and against the persons composing the firm of C. L. Sowell & Co., a partnership engaged in the manufacture of lumber at their mills on the Pensacola and Selma railroad in said county; and sought to enjoin said C. L. Sowell & Co. from delivering any more lumber to said M. H. Sullivan, in violation of complainant's alleged rights, to make them account for the lumber already delivered, and to compel them to deliver to him the residue of the lumber stipulated for in his alleged contract with them. According to the allegations of the bill, the said partnership between D. F. Sullivan and the complainant was formed in July, 1882, in the city of Pensacola, Florida, "upon the following basis: The said D. F. Sullivan owned three-fourths, and complainant one-fourth, of the property called and known as the *Molino Mills*, consisting of the mill-site, machinery, mill-house, dwelling-house, store-houses, planing-mills, dry kiln, locomotives, cars, railroad bed and tracks, docks for stacking lumber, booms, live-stock, office furniture, logs, and between fifty and sixty thousand acres of land; a part of which property is in Florida, and a part in Escambia county, Alabama;" and the interest of each partner in the profits and losses of the partnership was in the same proportion. The bill alleged, also, that the complainant "had the exclusive management of the said mill property, in getting logs, lumber and timber, under contract with other parties, cutting the same into lumber and timber, shipping the same to market, and all other things necessary for the manufacturing and shipment of lumber and timber at said mills, as well as the management and control of the mercantile business connected with said milling business." It was alleged, also, that said D. F. Sullivan "had large private interests outside of the business connected with said partnership," and was engaged, among other things, in purchasing, selling and exporting lumber and timber

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from Pensacola to foreign markets; that in the prosecution of this business, in December, 1883, he made a contract with a New York corporation, called the Export Lumber Company, for the sale and delivery within twelve months from the 28th December, 1883, of thirteen million feet of lumber and timber, and, on the 5th day January, 1884, "made a sub-contract with said Molino Mills Company, for the manufacture and delivery to him, on his private account, of two-thirds of said amount of lumber and timber, upon the following terms and conditions: that said company was to cut and deliver said lumber and timber, as fast as vessels chartered for the purpose required it, not exceeding two-thirds of a million feet per month." It was further alleged that, under the contract, the said Molino Mills Company delivered to said Sullivan, up to the time of his death, which occurred on the 14th June, 1884, between two and three million feet of lumber, and complainant continued to manufacture and deliver lumber to his executors until September, 1884, when the mills were destroyed by fire, leaving a large quantity of logs and timber on hand; that complainant, as surviving partner of said firm, immediately contracted with said C. L. Sowell & Co. for the manufacture by them of said logs and timber into lumber, which he delivered to them for that purpose, and, in addition, for the manufacture and delivery by them to him, "on the cars at their said mills," of two million feet of lumber, to be delivered by him to said Sullivan's executors in performance of said contract between him and the Molino Mills Company; that said Sowell & Co. delivered to him, under this contract, over two hundred thousand feet of lumber, which he delivered to said Sullivan's executor, and they afterwards delivered a large quantity to said executor directly, in violation of their contract with complainant, and threaten to deliver to said executor all the residue of the manufactured lumber which they have on hand, he having given them a bond of indemnity against any claim on the part of the complainant; that on the 24th December, 1884, complainant, as the surviving partner of said firm, drew on said Sullivan's executor and executrix "for three cargoes of lumber and timber, a portion of that embraced in said contract and delivered as aforesaid," but they refused to pay the same, or any part thereof, though they had full authority under the will to pay the same; and it was then alleged and charged, "that if said Sowell & Co. are permitted to continue the delivery of said lumber and timber to said Martin H. Sullivan, as they have done, are doing, and threaten to continue doing, it will completely destroy the right of complainant, as surviving partner of said firm, to close up the business of said partnership, and to protect his individual interests and the interests of the creditors

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of said concern." On these allegations, the bill prayed that Sowell & Co. be enjoined and restrained from delivering any more lumber to said Sullivan's executors, either individually or in their representative capacity; that they be required to account for the lumber already delivered to said executors, and to manufacture and deliver to the complainant the residue of the lumber necessary to complete the performance of their contract with him; and the general prayer, for other and further relief, was added.

On the filing of the bill, an injunction was granted by the presiding judge of the City Court of Montgomery. An answer to the bill was filed by Sowell & Co., denying that they had ever made any contract with the complainant for the manufacture or delivery of any lumber whatever, and alleging that the lumber which they had delivered to said Martin H. Sullivan was manufactured and delivered under a contract made directly between him and them.

An answer was also filed by said Martin H. Sullivan, in substance as follows: "Denies that complainant is the surviving partner of the partnership known as the Molino Mills Company, and alleges, on the contrary, that this respondent and said D. F. Sullivan were in fact owners in common of all property and interests of every kind, which they held as partners under the style of D. F. Sullivan; and that the three-fourths interest held by said D. F. Sullivan in the said firm of the Molino Mills, was in fact the partnership property of the firm of D. F. Sullivan, composed of said D. F. Sullivan and this respondent; and on the death of said D. F. Sullivan, this respondent, as surviving partner of the firm conducted under his name, became invested with all the rights and powers which belonged to said firm as a member of the partnership known as the Molino Mills Company." Admits that the Molino Mills Company owned the property described in the bill, "and that complainant owned one-fourth, and three-fourths stood in the name of said D. F. Sullivan, but was in fact the property of the partnership conducted under his name, which was composed, as above stated, of said D. F. Sullivan and the respondent." Denies that complainant "had the exclusive management of said mill property," and avers, "on the contrary, that his management was subject to the orders and control of said D. F. Sullivan, and it was not within the power of said company, nor of said complainant acting for it, to make any purchase of lumber or timber for said mills, except by the special order of said D. F. Sullivan; nor did said company, or complainant for it, ever make, or have the power to make, a shipment of lumber or timber to market; for it was the very basis of said firm of the Molino Mills Company that its business was confined

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strictly to the manufacture of lumber and timber, for and under the orders of said Sullivan, and that after the lumber and timber was put on the cars furnished by said D. F. Sullivan, at Molino, the power and control of said company over it ceased; and in the management of said mill business, said D. F. Sullivan required of complainant weekly reports, and often more frequent, of all his acts." Admits that said D. F. Sullivan had large business interests outside of said Molino Mills, and was engaged in the purchase and export of lumber and timber; in all which business, it was alleged, respondent was a silent partner to the extent of one-half; also, that said Sullivan made a contract with said Export Lumber Company of New York, as alleged in the bill, "but denies that he made any sub-contract with said Molino Mills Company, to enable him to fulfill that contract, and alleges that he ordered and required said Molino Mills, as it was his right to do, to manufacture and ship to D. F. Sullivan the lumber and timber required by that house to fulfill said contract with said Export Lumber Company;" and that shipments of lumber were made, pursuant to these orders, to the amount stated in the bill, up to the death of said D. F. Sullivan. After the death of said D. F. Sullivan, and after the respondent, as the surviving partner of the firm conducted under his name, had taken charge of all its business, with the assent and concurrence of Mrs. Sullivan as executrix, the Molino Mills Company continued to furnish lumber to him, to the amount stated in the bill, to enable him to fulfill D. F. Sullivan's contract with the Export Lumber Company; "but it is not true that complainant managed the property of the said Molino Mills, after the death of said D. F. Sullivan, or delivered lumber and timber to this respondent, in any character different from that in which he had acted prior to the death of said Sullivan. Said Molino Mills did not make, nor did complainant for it make, nor did either of them have any power or authority to make, any contract with said C. L. Sowell & Co., as stated in the bill; nor did complainant as surviving partner, or in any other capacity, ever furnish to this respondent in any capacity, or to Mrs. Emily F. Sullivan as executrix, any timber or lumber manufactured by said C. L. Sowell & Co.: on the contrary, all the lumber and timber procured by respondent from them was delivered under contracts made between them and this respondent, and so made by him to enable him, as surviving partner, to fulfill the said contract of his house with said Export Lumber Company. Said Sowell & Co. now have on hand, and are manufacturing a large quantity of lumber, as stated in said bill, which they intend to deliver to this respondent, to enable him to fulfill said contract with said Export Lumber Company, and for which five

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ships are now waiting in the harbor of Pensacola. After said notice was served on them by complainant, this respondent did give them a written guaranty against any claim on the part of said complainant, because he considered it an unjust and unwarranted attempt by complainant to interfere with the business of this respondent, at a time when five ships were waiting for lumber and timber; and it is the intention of this respondent to remove lumber and timber from the mill of said Sowell & Co., which is immediately on said railroad, to load said five ships, as soon as he can do so, to prevent damages under said contract with said Export Lumber Company, which may amount to \$100,000." Admits the drawing, presentment and protest of said check, which was for \$25,000, "but denies the authority of complainant, in any capacity whatever, to draw said check."

After the filing of the foregoing answers, a motion was submitted to the chancellor, on behalf of "the respondents," to dissolve the injunction; and a counter motion was submitted, on behalf of the complainant, for an attachment for contempt, on account of an alleged violation of the injunction. The chancellor dissolved the injunction, and his decree to that effect is now assigned as error.

FARNHAM & RABB, for appellant.—The equity of the bill, and the right to an injunction as prayed, rest on several well-settled principles of equity jurisdiction: (1.) On the ground of partnership dealings, and the necessity of its intervention to protect the rights of the surviving partner, who is a trustee for all parties interested.—Story's Equity, vol. 1, §§ 668-76; 2 Dan. Ch. Pl. & Pr. (Cooper's ed.), § 1660; 15 Vesey, 218; *Peacock v. Peacock*, 16 Vesey, 49. Where there are two partnerships, having dealings with each other, there is no remedy at law, and a court of equity alone can grant relief. 1 Story's Equity, §§ 679-83. (2.) On the ground of specific performance of an executory contract, against the executor of the deceased partner, where the executor has the authority to perform, and it is his duty to perform.—1 Parsons on Contracts, 131, and notes; 2 *Ib.* 533; 3 *Ib.* 357; Linley's Part., Ewell's ed., vol. 2, pp. 996-7; *Hall v. Warren*, 9 Vesey, 608; *Bennett v. Smith*, 10 Eng. Law & Eq. 274; 16 Jurist, 422. (3.) To prevent a multiplicity of suits, or vexatious litigation, where there is a present right of property or possession, and danger of interference with it, whereby it may be lost, converted, or diminished, unless the court intervenes.—2 Story's Equity, §§ 827-8, 843-4, 872-3, 901-12, 914-19; Brick. Digest, vol. 1, 684, § 650; 2 Atk 483; *Eldridge v. Hill*, 2 John. Ch. 281; Bispham's Equity, 362-70. (4.) To restrain the

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wrongful alienation, removal, or destruction of property, in case of irreparable damage, although a specific performance might not be decreed.—2 Dan. Ch. Pl. & Pr., §§ 1651-57, 1663, note; 2 Story's Equity, §§ 954-59; *Robbins v. Webb*, 68 Ala. 399; *Chambers v. Ala. Iron Co.*, 67 Ala. 353. (5.) Where the complainant makes out a strong *prima facie* case, the injunction will be retained, notwithstanding the denials of the answer, until the final hearing.—*Falls Village v. Tibbetts*, 31 Conn. 165; *Irwin v. Dixon*, 9 Howard, 28; *Stewart v. Chew*, 3 Bland's Ch. (Md.) 440; *Peak v. Hayden*, 3 Bush, 125. That the court is not bound to dissolve the injunction on the denials of the answer, see *Miller v. Bates*, 35 Ala. 580; 17 Ala. 667; 51 Ala. 484; 38 Ala. 613; 67 Ala. 353. That defective allegations, which are amendable, are not sufficient ground for dissolving the injunction, see *Robertson v. Walker*, 51 Ala. 484; *Hooper v. Railroad Co.*, 69 Ala. 529; *Satterfield v. John*, 53 Ala. 127.

STALLWORTH & BURNETT, and STRINGFELLOW & LEGRAND, *contra*.—(1.) On the allegations of the bill, the complainant has a complete and adequate remedy by actions at law; and a case of irreparable damage is not shown, because there is no allegation of the insolvency of the defendants—*Powell v. Plankroad Co.*, 24 Ala. 441; *Comer v. Bankhead*, 70 Ala. 493; 1 Brick. Dig. 692, §§ 768, 783; *Chambers v. Ala. Iron Co.*, 67 Ala. 353. (2.) The material averments of the bill, on which its equity rests (if it has any), are denied by the answers; and the injunction was properly dissolved on these denials.—*Saunders v. Cavett*, 38 Ala. 54; *Brooks v. Diaz & Co.*, 35 Ala. 599; *Mallory v. Matlock*, 10 Ala. 595; *Dunlap v. Clements*, 7 Ala. 539; *Long v. Brown*, 4 Ala. 622; *Collier v. Faulk*, 61 Ala. 105; *Weems v. Weems*, 73 Ala. 462.

STONE, C. J.—According to the averments of the bill, the Molino Mills Company was a partnership, composed of Daniel F. Sullivan, owning three-fourths interest, and Matthew L. Davis, owning one-fourth interest. The bill speaks of no other partners; and if the averments are true, there are no other partners, as there can be no other interests owned by another. Daniel F. Sullivan died before the origin of any controversy, out of which this suit arose. It results, then, that according to complainant's case, he was the sole surviving partner of the Molino Mills property. In Parsons on Partnership, §§ 440*, 442*, the rights and powers of the surviving partner are correctly summarized, as follows: "The death of a partner invests the surviving partners with the exclusive right of possession and management of the whole partnership property and

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business ; but only for the purpose of selling and closing the same. . . . The survivors have possession, and keep possession of every thing. Until a settlement, the representatives of the deceased can not claim or take any one chattel, or any portion of the merchandise. The survivors are, from the death, trustees for all concerned in the partnership ; for the representatives of the deceased, for the creditors of the firm, and for themselves. Their trust is to wind up the concern in the best manner for all interested, and, therefore, without necessary delay ; and their powers are such as enable them most effectually to execute that trust. Nor do we know any difference, in this respect, as to the choses in possession, and those in action." If the averments of the bill be true, Davis, the complainant, was entitled to the entire custody, management and control of the property and business interests brought to view and presented for determination in this suit.

The answer of Martin H. Sullivan, one of the executors of D. F. Sullivan, deceased, admits that the Molino Mills property was owned in partnership by Sullivan and Davis ; admits that Davis' interest is what he claims it to be, and that D. F. Sullivan, the testator, held in his own name the remaining three-fourths of the property. The bill and answer substantially agree thus far. The answer, however, sets up that, notwithstanding D. F. Sullivan was the only known partner with Davis in the Molino Mills property, yet he, the said Martin H., was a silent, equal partner with the said David F. in all his business enterprises, including the Molino Mills property, and that said property was in fact held and owned, three-eighths each, by the said Martin H. and the estate of David F., and one-fourth by complainant, Davis. The answer denies that Davis is *the* surviving partner, and sets up that he, Martin H., is also a surviving partner. If this be true, then Davis and Martin H. Sullivan are surviving partners, with the powers enumerated above resting in the two ; and each would have the equal right to possess, manage, and control the partnership effects. It follows from this, that if Martin H. Sullivan was a partner, he was authorized, equally with Davis, to receive the lumber from Sowell & Co., and a delivery by the latter to him was lawful, and discharged them from all liability to Davis.—*Crosswell v. Lehman, Durr & Co.*, 54 Ala. 363. So, the pivotal point—the only really controverted issue of fact—in this aspect of the case, is, whether or not Martin H. Sullivan was a partner in the Molino Mills property. In this disputed question of fact, Sowell & Co. are largely interested ; for, if Davis be the only survivor, it is not perceived how they can defend themselves against a claim by the latter that the property of the partnership shall be delivered to him, the survivor.

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As we have said above, there is but one material difference between the facts averred in the bill, and those set up in the answer. It is not denied that Davis was a co-partner with D. F. Sullivan in the Molino Mills property, and that the latter died, leaving Davis surviving him. It is averred, and is not denied, that Davis was a partner only in the mill property, and in large timber lands for supplying timber for the mills' consumption; that the business of that firm extended only to the procuring of logs, bringing them to the mill, sawing them into lumber or timber, and selling such lumber at a home market; and in such connected enterprises, as were tributary to this chief aim. Sullivan had other and larger employments and enterprises, with which Davis had no connection. Notably, he bought and sold lumber and sawn timber, and supplied cargoes for shipment, procured in part from the Molino Mills, and partly from other mills. It is not stated in so many words, but the irresistible inference, alike from the bill and answer, is, that to the extent he obtained lumber and manufactured timber from the Molino Mills, he, Daniel F. Sullivan, became a purchaser from the Molino Mills Company—Sullivan & Davis. The latter was not interested in the profits or losses, made or suffered after delivery to Sullivan, at the home market.

Shortly before Sullivan's death, he made a contract with a lumber exporting company to deliver to them, at Pensacola, Florida, thirteen millions feet of lumber and timber, for shipment to South America. The delivery was not to be made at one and the same time, but at continuous intervals, running through several months. Soon afterwards, Sullivan died, with little or no part of his contract complied with, but after some preparation had been made for having the lumber manufactured, that it might be delivered. The bill avers that Sullivan contracted with the Molino Mills Company to manufacture and deliver to him two-thirds of this lumber, at the rate of two-thirds of a million feet per month, and that the remaining third he was to obtain from other mills. The answer, while admitting that Davis was no party to the sale to the lumber exporting company, had no interest in that contract, and yet was to furnish every month two-thirds of a million of feet of lumber, to be delivered by Sullivan on his contract with the lumber exporting company, denies that Sullivan made any contract with the Molino Mills Company. Its averment is, that Sullivan simply ordered that company to furnish to him that proportion of the lumber, at that rate per month. This is a distinction without a difference. If Davis had no part or interest in the sale to the lumber exporting company, then the supply of lumber by the Molino Mills Company to Sullivan, to be used in performance of his contract, was a contract of sale, express or im-

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plied, by the company to Sullivan, one of its own members. Taking, then, the substance of the bill and the answer on this question, when Sullivan died, he was under a large executory contract with the Lumber Exporting Company, a very small part of which, if any, had been performed; and the Molino Mills Company, of which Davis was a member, was under a similar contract, in amount two-thirds as great, complied with only to a partial, if any extent. The death of Sullivan did not absolve either party from the performance of his contract, unless there was a stipulation that such event should work that result; and the pleadings are silent as to such stipulation. This executory agreement, not having been performed when Sullivan died, had the effect of continuing the partnership in existence, with its active functions, until its terms were complied with.—Parsons on Partnership, 398*, 417*. So, it would seem to have been of great importance to Sullivan's estate that this large executory contract with the Lumber Exporting Company, existing at the time of his death, should be complied with, and, as contributing thereto, that the Molino Mills Company—Matthew L. Davis, survivor—should comply with its contract.—*Mudge v. Treat*, 57 Ala. 1.

The Molino Mills were burned, before much progress was made in complying with its contract, but having on hand a large quantity of timber, cut and ready to be manufactured into lumber. They had also very extensive timber tracts, from which to procure other timber. The firm of Sowell & Co., millmen, were employed to saw this timber, and, to this end, it was carried to their mill, and there sawed. They were also to saw other timber, to be furnished them from the lands of the Molino Mills, under the superintendence and direction of Matthew L. Davis, the complainant in this suit. Under this contract, Sowell & Co. had manufactured lumber, a considerable quantity of which had been shipped to Pensacola, consigned to Martin H. Sullivan, the executor of Daniel F. Sullivan's will, to be used by him in performing the contract with the Lumber Export Company. They were also engaged in sawing timber, so obtained from the Molino Mills Company, and in shipping the same to M. H. Sullivan, as above. The business was large, rapid and continuous, to meet pressing demands made by the Lumber Export Company, under the terms of their contract. Davis drew on Sullivan, the executor—amount not stated in the bill—which the latter dishonored. We have no means of knowing how the account then stood, in the matter of the lumber contract, between the Molino Mills Company, and the estate of Daniel F. Sullivan. The pleadings furnish no *data* for such calculation. Nor does the defense set up, as a reason for dishonoring the draft, that it was in ex-

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cess of the sum then earned and due from Sullivan's estate to the Molino Mills Company, on the lumber contract. Davis then notified Sowell & Co. not to ship or deliver any more lumber to Sullivan, executor, except through, and under the orders of him, Davis. Sowell & Co. disobeyed this order, and thereupon Davis filed this bill, and obtained a preliminary injunction against Sowell & Co. and Martin H. Sullivan, executor, restraining the one from delivering, and the other from receiving lumber under said contract. This injunction was dissolved on answer, and an appeal taken to this court.

It may as well be stated here as elsewhere, that in submitting to the chancellor the motion to dissolve, the note of submission states it was submitted on bill and answer. We will not, therefore, on this appeal, regard the affidavits which are found in the transcript. They were submitted on the other motion; heard at the same time, and not on this. We need not determine whether, if offered, they would have been admissible on the motion to dissolve.—*Barnard v. Davis*, 54 Ala. 565.

In the matter of making the contract with Sowell & Co., there is a difference of fact between the averments of the bill and the statements of the answer. The bill avers that Davis made the contract. The answer denies this, and states that Martin H. Sullivan contracted with Sowell & Co. So far as legal rights and liabilities are concerned, it would seem this can make no material difference. If, as the undisputed facts tend to show, Sowell & Co. were simply employed to aid in complying with the Molino Mills' part of the contract—that is, to manufacture the lumber the Molino Mills Company had promised to manufacture for Daniel F. Sullivan—then, if both Davis and Martin L. Sullivan were surviving partners, it was in effect a contract with both, and either would have the right to accept and receive the performance. On the other hand, if Martin H. Sullivan was not a partner, and, nevertheless, made the contract with Sowell & Co., then, in legal effect, the contract, if adopted by Davis, was made with him; Martin H. Sullivan being held, in such case, to have acted as the agent of Davis, the latter being the only partner authorized to make such contract. This question, like the other, must depend on the inquiry, whether Martin H. Sullivan was a partner in the Molino Mills Company.

It is contended that the injunction was rightly dissolved, because the bill presents no case for equitable interposition. The precise form of this argument is, that Davis had a complete and adequate remedy at law. If the averments of the bill be true, then a refusal by Sowell & Co. to deliver the lumber to Davis, on his demand and payment or tender of their proper charges, would be a conversion, for which an action would lie

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against them. And turning over the lumber to Martin H. Sullivan, unless, as he alleges, he was a partner in the Molino Mills property, would give him no rightful possession; and any act of dominion he exercised over the property thus turned over, would render him personally liable therefor. If he applied it in part performance of Daniel F. Sullivan's sale to the Lumber Export Company, then it fastened a legal liability on the estate of said Daniel F., for which Davis could maintain an action at law, for goods sold and delivered. This, because the death of Daniel F. Sullivan removed every obstacle to the maintenance of such action.—*Lacy v. Le Bruce*, 6 Ala. 904.

There is another ground, however, on which, it is contended, the jurisdiction of the Chancery Court can be maintained. The performance of the contract made by Sowell & Co. manifestly contemplated many partial deliveries, running through many days,—in fact, several months. To sue at law, for each breach of duty, would require very many suits. The aggrieved party must incur this immense trouble and expense, or, taking the risks, wait until the entire contract is fulfilled, and then bring an action for the entire breach. Chancery sometimes intervenes to prevent a multiplicity of suits, or to quiet a long, harassing litigation.—1 Pom. Eq. §§ 250, 252. We will not decide, at this stage of this case, and in the absence of further argument, whether or not this bill contains equity, in that it seeks to settle, in one suit, what it avers is a tortious wrong, continuous in its character. There is no averment that they are not solvent, or able to respond in the full measure of any injury the complainant may sustain. If it were averred that Sowell & Co. are not fully able to respond in damages, the complainant's case would be the stronger. It would possibly be impregnable, if all the defendants are unable to answer in damages for the wrong the bill charges they are committing against complainant.

We have, then, the naked case of a bill filed against parties who, in the absence of averment to the contrary, we must presume are amply able to make compensation for any tortious injury they may inflict. It is not charged that Sowell & Co do not deliver, and faithfully account to Sullivan, for all the logs turned into lumber and timber by them, according to the strict letter of their contract. It is not charged M. H. Sullivan is not faithfully and fully delivering the lumber and timber, thus received from Sowell & Co., to the Lumber Export Company, in performance of the large contract made by his testator with that company. The complaint is two-fold: first, that the lumber is not allowed to pass through the hands of Davis, surviving partner, who is thereby deprived of his right to know, and keep an account of the delivery, and its progress; second, that Sullivan, the executor, refused to honor Davis' draft, without stating

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its amount, and without stating whether or not it was in excess of the sum due to the Molino Mills Company from Sullivan's estate, on the then partly performed contract to saw and deliver lumber, made by the company with Sullivan. Ought the injunction to have been awarded? In considering this question, we will regard as true the averment of the bill, that Davis was the surviving partner of the Molino Mills Company. What is relied on as a denial of this, is not strictly such. It is a confession and avoidance.—*Rembert v. Brown*, 17 Ala. 667.

In High on Injunctions, § 13, it is said, the Chancery Court is sometimes "governed, in deciding an application for a preliminary injunction, by considerations of the relative convenience and inconvenience which may result to the parties from granting or withholding the writ. . . . Where it appears that greater danger is likely to result from granting, than from withholding the relief, or where the inconvenience seems to be equally divided as between the parties, the injunction will be refused, and the parties left as they are, until the legal right can be determined by law."

In the case of the *S. & C. Railway Co. v. S. & B. Railway Co.*, 1 Simons, N. S. 410, the purpose of the bill was to restrain the consummation of an agreement then under negotiation, which materially changed the relations existing between the two railway companies, under a prior contract still unexpired. The *gravamen* of the bill was, that the proposed change was unauthorized, and would be greatly injurious to the party complainant. A temporary injunction was moved for. A most elaborate opinion was delivered by Lord Cranworth, vice-chancellor, in which, after stating that "there can be no doubt of the fact, that the proposed agreement is an agreement altogether inconsistent with the contract of July, 1850," he refused the injunction, giving the following condensed reiteration of the reasons which influenced him: "Although I am perfectly satisfied of the authority of this court to issue an injunction, not merely to restrain parties from doing acts, but also from entering into contracts, pending litigation, that may embarrass the plaintiff in his suit; and that the court is entitled to do so, whenever it sees there is a fair ground for litigation raised by the plaintiff; yet, that right of the court must be guided by a discretion, not to exercise it where it sees that, on the balance of convenience and inconvenience between *interim* interference and *non-interim* interference, the balance greatly preponderates in favor of the defendant, and against the plaintiff. Now, here, the injury to the plaintiffs, in comparison with the injury to the defendants, is extremely small. The contract between the plaintiffs and the defendants may be put an end to in three years. The present rate of through traffic seems to be

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something like £12,000 a year. Three years would be something like £36,000; that is, on both lines, so that it would be the half of that. The plaintiffs would be entitled, if there was no other remedy, to an action for that; and though it may not be quite easy for them to prove the exact amount they lose, yet that is a matter not altogether incapable of being estimated; and, on the whole, if the convenience and the inconvenience are weighed against each other, the inconvenience seems to me to preponderate, beyond all measure, in favor of the party who has the legal right to enter into any legal contract he pleases. This is the short ground on which I feel myself bound to refuse the injunction." To the same effect are *The Attorney-General v. The Mayor*, 1 Myl. & Cr. 171; *Fielden v. L. & Y. Railway Co.*, 2 De Gex & Sm. Rep. 531; *Dyke v. Taylor*, 3 De Gex, F. & J. 467. And in this country the same doctrine prevails. In *Hack. Imp. Com. v. N. J. M. Railway Co.*, 7 N. J. Eq. 94, it is said: "An injunction will not issue, when the benefit secured by it is of little importance, while it will operate oppressively and to the great annoyance and injury of the defendant, unless the wrong complained of is wanton and unprovoked." To the same effect are *M. & E. R. R. Co. v. Prudden*, 5 N. J. Eq. 530; *Olmstead v. Kolster*, 14 Kan. 463; *Brown v. Pacific Mail Steamship Co.*, 5 Blatch. 525; *McCorkle v. Brem*, 76 N. C. 407.

The granting or withholding a preliminary injunction is, and, for manifest reasons, should be, largely a matter within enlightened discretion, controlled materially by the balance of convenience and inconvenience. Such writ, in this case, may cause a breach of Sullivan's contract with the Lumber Export Company, and entail large prospective damages for the breach. It may, moreover, render it impossible for the Molino Mills Company to perform its contract with D. F. Sullivan. This would entail a probable loss on the company, with possible damages for its breach of contract. Against these, we can conceive of no possible injury Davis can suffer from the failure to obtain an injunction, which approximates them in amount. The injunction granted, taking only the averments of the bill as our guide, was improvidently granted; and having been dissolved, we think we should not reinstate it.

The decretal order of the chancellor, dissolving the injunction, is affirmed.

Johnson v. Buckhaults.

Bill in Equity for Foreclosure of Mortgage.

1. *Foreclosure of mortgage, when debt is payable in installments.*—When the mortgage debt is payable in installments, and default is made in the payment of any one of them, the mortgage may be at once foreclosed, and a sale of the property decreed, without waiting for the maturity of the other installments; unless this construction is repelled, expressly or by implication, by the terms of the instrument itself, which is to be construed most strongly against the mortgagor.

2. *Same; construction of mortgage.*—Where the mortgage debt is evidenced by a written instrument in the form of a promissory note, by which the mortgagors promise to pay and deliver twenty-four bales of cotton, in three annual installments of eight bales each; and the mortgage, setting out this instrument, is conditioned, “that if we [they] pay the said note on or before the same becomes due,” with costs of recording, “then this conveyance to be void; but, if we [they] fail to pay said sum when due, then said B., his agents or assigns, are authorized to take possession of any or all of said property, and sell the same at public outcry for cash,” after giving notice as prescribed, “and out of the proceeds of such sale to pay, first, the costs and expenses, and all costs of collecting; second, the amount, with interest, that may be due on the debt above mentioned, and the residue, if any, to the undersigned,” mortgagors; the mortgage may be foreclosed, on default being made in the payment and delivery of the first installment of cotton, although the other installments are not due.

APPEAL from the Chancery Court of Butler.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on 8th October, 1884, by George R. G. Buckhaults, against J. M. Johnson and Sarah Johnson; and sought to foreclose a mortgage on the tract of land, which the complainant had sold and conveyed to the defendants, taking the mortgage to secure their note or obligation for the agreed price. This obligation, which was dated “Greenville, Ala., Dec. 12th, 1882,” signed by both of the defendants, and attested by two witnesses, was in these words: “On the first day of October, 1884, we promise to pay to Geo. R. G. Buckhaults eight (8) bales of lint-cotton; and on the first day of October, 1885, eight bales of lint-cotton; and on the first day of October, 1886, eight bales of lint-cotton; all to be delivered in Greenville, Alabama, weighing 500 lbs. each, and class low middlings.” The mortgage, a copy of which was made an exhibit to the bill, was also dated December 12th, 1882, and set out this instrument on its face; purported to be given “for the further security of the above note,” and was conditioned as

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follows : "Upon condition, however, that if we pay the said note on or before the same becomes due, and also the expenses of probating and recording this instrument, then this conveyance to be void. But, if we fail to pay said sum when due, then the said Buckhaults, his agents or assigns, are hereby authorized to take possession of any or all of the above conveyed property, and sell the same at public outcry for cash, before the court-house door in Greenville, after giving ten days notice of such sale," &c. ; "and, out of the proceeds of such sale, to pay, first, the costs and expenses of such seizure and sale, and of recording and probating this instrument, and all costs of collecting ; 2d, the amount, with interest, that may be due on the debt above mentioned ; and the residue, if any, pay to the undersigned." The bill alleged that the defendants had failed to deliver any part of the eight bales of cotton which, by the terms of said written instrument, they bound themselves to deliver on the 1st October, 1884 ; and that they were cutting down, destroying and selling the timber on the mortgaged land, thereby greatly lessening its value. The bill prayed that the defendants be enjoined from cutting or selling any more timber until the final hearing of the cause ; that an account be taken "of the amount and value of the cotton due to complainant for the purchase-price of said lands, and also for costs of recording, collecting," &c. ; that a lien on the lands be declared in his favor, for the amount ascertained to be due to him ; "that said lien be foreclosed, in the event of a failure to pay said amount, and said lands be sold, as well for the payments not yet due as for the payment now due ; that the proceeds of such sale be applied to the payment of the costs of this case, and of the amount due to complainant ;" and for other and further relief, under the general prayer.

The defendants demurred to the bill, on the ground that it was prematurely filed, but the chancellor overruled their demurrer ; and his decree on the demurrer is now assigned as error.

J. F. STALLINGS, for the appellant, contended that, by the terms of the mortgage, there could be no foreclosure until the maturity of the entire debt.

GAMBLE & RICHARDSON, *contra*, cited *Mussina v. Bartlett*, 8 Porter, 277 ; *Levert v. Redwood*, 9 Porter, 79 ; *McLean v. Presley's Adm'r*, 56 Ala. 211.

SOMERVILLE, J.—A mortgage may be foreclosed, and a sale directed, when the first installment of the mortgage debt falls due, without waiting for the maturity of the other install-

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ments, unless the mortgagee, by the very terms of the mortgage, is precluded, expressly or by implication, from the exercise of this right.—*McLean v. Presley*, 56 Ala. 211; *Walker v. Hallett*, 1 Ala. 379; *Levert v. Redwood*, 9 Port. 79; *Mussina v. Bartlett*, 8 Port. 277; 2 Jones on Mortg. § 1459.

In construing the terms of the instrument, the settled rule is, that all ambiguous or equivocal language must be construed most strongly against the mortgagors, the selection of such language being imputed to them.

The present debt is payable in three separate installments, only the first of which was due on the filing of the bill. The condition of the conveyance provides, that if the grantors “fail to pay said *sum* when due,” the mortgagee is authorized to take possession and sell, and out of the proceeds, after paying certain costs and expenses, to pay “the amount, with interest, that may be due” on the mortgage debt. We are of opinion, that there was a breach of the condition of the contract by the mortgagors when they failed to pay the first installment of the debt when it fell due, there being nothing in the terms of the mortgage which can be construed to repel this construction. *McLean v. Presley*, 56 Ala. 211, *supra*.

If the mortgage is valid, and there is a right of foreclosure, it is immaterial whether the vendor’s lien was waived or not. Hence, we do not consider this question.

There is no error in the rulings of the court on the demurrer to the bill, and the decree is affirmed.

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Bill in Equity by Creditors to set aside Fraudulent Conveyance.

1. *Multifariousness*.—A bill filed by simple-contract creditors (Code, § 3886), seeking to set aside, on the ground of fraud, a conveyance executed by their deceased debtor to his wife, and to subject the property to the satisfaction of their debts, and also to compel the settlement of a subsequent assignment by the debtor for the benefit of his creditors, to remove the trustee, and to have a receiver appointed for the assets in his hands, is multifarious, since the debtor’s wife has no interest in the litigation concerning the property conveyed by the assignment, and the assignee has no interest in the litigation about the property conveyed to her.

2. *Conveyance by husband to wife; validity as against creditors*.—The conveyance by a husband to his wife, here assailed by subsequent creditors on the ground of fraud, was held fraudulent and void, on substantially the same facts, in the case of *Seals v. Robinson & Co.*, at the last

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term (which see, in 75 Ala. 363); and the court adheres to the conclusion then announced.

3. *Purchase at sheriff's sale, by fraudulent grantee.*—A fraudulent grantee of property may become the purchaser at a sale under execution having a paramount lien, and thereby acquire a title which will prevail over subsequent creditors seeking to set aside his conveyance on the ground of fraud, leaving them nothing but the statutory right of redemption.

4. *Statutory right of redemption; not extended in equity.*—The right of redemption, given by statute to judgment creditors (Code, §§ 2881-82), can not be extended by a court of equity to creditors by simple contract only, although their debts are ascertained and adjudged by the decree.

APPEAL from the Chancery Court of Pike.

Heard before the Hon. JOHN A. FOSTER.

The original bill in this case was filed on the 21st September, 1882, by Pheiffer & Co., merchants and partners doing business in the city of New York, and several other creditors of S. J. Seals, deceased, who was, at the time of his death, or a short time before, engaged in business as a merchant in the town of Troy in said county of Pike; against Mrs. R. C. Seals, the widow, and the several minor children of said decedent, and against W. A. Weldon, who was the father of Mrs. Seals; and sought to set aside, on the ground of fraud, a conveyance of property executed by said decedent to his wife, and to have the property subjected by sale to the satisfaction of the complainants' debts. The conveyance to Mrs. Seals, a copy of which was made an exhibit to the bill, was dated the 17th June, 1881, but was not filed for record until the 9th January, 1882; and the bill alleged that it was fraudulently ante-dated, or, if executed and delivered on the day of its date, was fraudulently withheld from record, and that the complainants' several debts were contracted on the faith of the property conveyed by it, and in ignorance of its existence. The consideration recited in the deed was natural love and affection, and the property conveyed consisted of two brick store-houses and other lots situated in the town of Troy, which the bill alleged was all the real estate then owned by said S. J. Seals. The complainants' debts, or most of them, were contracted after the date of this conveyance; and the bill sought to set it aside on the ground of fraud in fact.

Said S. J. Seals died, intestate, on or about the 29th February, 1882, having executed, a few days before his death, a deed of assignment conveying all his property (except the exemptions allowed him by law), by general words of description, to said W. A. Weldon as trustee, for the benefit of all his creditors equally, authorizing him to sell the property, and to apply the proceeds to the payment *pro tanto* of his debts. The execution of this assignment was alleged in the original bill, and the trustee was made a defendant to the bill, but no relief was

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asked against him; and it was also alleged that no letters of administration had ever been granted on the estate of said decedent, and that there was no necessity for any administration, as he left no property subject to administration. An amended bill was afterwards filed, alleging the grant of administration to the sheriff *virtute officii*, and making him a party defendant; alleging, also, that said Weldon, the trustee in the deed of assignment, had failed and neglected to collect the assets which were available for the payment of debts, had failed to redeem the real estate conveyed to Mrs. Seals (which had been sold under execution), although it brought much less than its real value, and he had ample funds to redeem it, and had been guilty of other violations of his duty as trustee; and therefore praying that he be compelled to make a settlement of his accounts as trustee, that he be removed, and that a receiver of the property and assets be appointed.

A guardian *ad litem* was appointed for the infant defendants, and filed a formal answer for them. An answer to the original bill was filed by Mrs. Seals, and also an answer to the amended bill; in which she denied the charges of fraud, asserted the validity of the conveyance to her, and set up a purchase by her of a part of the property at sheriff's sale, under an execution older than the date of her deed of gift; and in her answer to the amended bill she incorporated a demurrer, on the grounds of multifariousness, misjoinder, and want of equity. The trustee and the administrator, each, adopted the answer and demurrer of Mrs. Seals, and each insisted that he had no right to attack the deeds executed by the decedent, or to redeem the property sold under the execution. The deed of gift to Mrs. Seals, here assailed on the ground of fraud, is the same deed which was assailed by creditors in the case of *Seals v. Robinson & Co.*, at the last term (75 Ala. 363); and the depositions taken in that case were, by consent, used in this.

The chancellor overruled the demurrer, on all the grounds specially assigned; and on final hearing, on pleadings and proof, holding that the complainants were entitled to the relief sought by their bill, he declared the deed to Mrs. Seals to be fraudulent and void as against them, and ordered the property to be sold by the register, unless the amounts ascertained and adjudged to be due to the several complainants respectively were paid within ten days after the adjournment of the court; further declaring that said sale "is subject to any rights acquired by G. F. Holloway and Mrs. R. C. Seals in the purchase of any of said property at the sheriff's sale, the said complainants being allowed to pay to each of said purchasers (G. F. Holloway and R. C. Seals) the amount paid by them respectively at said sheriff's sale, with interest at the rate of ten

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per-cent. *per annum*, and all other lawful charges, for improvements or otherwise."

The appeal is sued out in the name of R. C. Seals *et al.*; and the errors assigned are, the overruling of the demurrers to the bill, and the final decree.

M. N. CARLISLE, for the appellants.—(1.) The bill, as amended, was demurrable for multifariousness, and also for misjoinder; Mrs. Seals having no interest whatever in the litigation with the assignee, and he having no connection with the litigation concerning the conveyance to her.—*McIntosh v. Alexander*, 16 Ala. 87; *Chapman v. Chunn*, 5 Ala. 597; *Kennedy v. Kennedy*, 2 Ala. 573; *Colburn v. Broughton*, 9 Ala. 351; *Meachem v. Williams*, 9 Ala. 842. (2.) As to the validity of the deed to Mrs. Seals, the question is again submitted to the consideration of the court. (3.) Aside from the validity of that deed, Mrs. Seals sets up her purchase at sheriff's sale under an execution having a paramount lien; and the validity of the title thus acquired is not assailed, but is recognized by the decree allowing the complainants to redeem. (4.) Only judgment creditors have a statutory right of redemption, and the complainants are not judgment creditors. Code, § 2881; *Thomason v. Scales*, 12 Ala. 309.

GARDNER & WILEY, *contra*, cited *Seals v. Robinson & Co.*, 75 Ala. 363.

CLOPTON, J.—The courts have generally recognized the impracticability of establishing any positive, definite or inflexible rule, by which to determine the question of multifariousness. Much discretion is necessarily left with the chancellor in deciding on the circumstances of each case, not an arbitrary discretion, but to be governed by settled principles of equity pleading. The court endeavors to adopt such course as "will best promote the due administration of justice, without multiplying unnecessary litigation on the one hand, or drawing suitors into needless and oppressive expenses on the other." The rule most generally applied is, that the bill will be held multifarious, where different claims are united in the same bill, there being no common ligament between them or material parts, and the case of each defendant being separate and distinct from the other defendants.—*Kennedy v. Kennedy*, 2 Ala. 571; *Meachem v. Williams*, 9 Ala. 842; *Waller v. Taylor*, 42 Ala. 297.

The amended bill seeks to vacate as fraudulent a conveyance of real estate made by S. J. Seals to his wife, and to subject the property to the payment of complainants' debts, and also

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to compel Weldon, to whom S. J. Seals executed an assignment for the benefit of his creditors subsequently to the conveyance to his wife, to make settlement, to remove him, and to appoint a receiver of the assets in his hands as such assignee. By reference to the bill and amendment, it is apparent that, although the complainants assert an equitable claim against both these defendants, the claims are entirely different, and that the assignee has no interest in, nor connection with the property conveyed to Mrs. Seals, and that Mrs. Seals has no interest in nor connection with the property embraced in the assignment, or the assignment itself. The case of each defendant is separate and distinct from that of the other. The union of these different claims in one bill can not be maintained on the ground of avoiding a multiplicity of suits, as not more than two suits are required to settle both claims. The demurrer for multifariousness should have been sustained. *Abernathy v. Bankhead*, 71 Ala. 190.

As the claim against Weldon as assignee does not appear to have been pressed, but to have been waived or abandoned, and as no decree was made affecting his rights, we probably would not have considered overruling the demurrer a reversible error, if the decree were correct in all other respects.

2. In *Seals v. Robinson & Co.*, at the last term (75 Ala.), the conveyance to Mrs. Seals from her husband was considered by this court on substantially the same facts contained in this record, and was then declared fraudulent as against his subsequent creditors. We find no reason to depart from the decision then made.

3. Mrs. Seals, however, sets up another title to a portion of the property. It appears that a part of the real estate conveyed to her was subsequently sold under executions having a paramount lien, a part of which was purchased by Holloway, and a part by her, at the sheriff's sale. When the property was aliened to her, she took the estate incumbered with this charge. The consummation of the sale, by the delivery of the sheriff's deed, vested in the purchasers the estate of the defendant in execution, subject to levy and sale. The title of the purchasers had relation to the origin of the lien, and overrides the conveyance to Mrs. Seals. Conceding that the conveyance is fraudulent, she had the right to purchase at the sheriff's sale; and if her purchase is *bona fide*, she acquired a valid title. The fraud of the first conveyance does not taint and vitiate a subsequent purchase in good faith. All that was left to the creditors of her husband, was the naked statutory right of redemption.

4. The right to redeem real estate, sold by the sheriff under execution, being derived from and dependent on the statute,

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can not be exercised by any person, other than the defendant in execution, or a judgment creditor: and the right of a judgment creditor to redeem is not complete, and can not be enforced in equity, unless there has been an antecedent compliance with all the statutory requirements, or an excuse for non-compliance without fault or neglect on his part.—*Thomason v. Seales*, 12 Ala. 312; *Spoor v. Phillips*, 27 Ala. 193; *Searey v. Oates*, 68 Ala. 111. The Chancery Court is without power or jurisdiction to confer the right on a simple-contract creditor.

The complainants, being only simple-contract creditors, can assert no claim against the property sold by the sheriff, other than by an attack on the purchase as fraudulent. This is the extent of the right, given by the statute, to a creditor without a lien. The court did not find the purchase by Mrs. Seals at the execution sale fraudulent, but treated and recognized it as valid, by decreeing that complainants might redeem. When the court ascertained the validity of the purchase against complainants, its power to dispose of the property ended, and nothing remained but to dismiss the bill as to it. The court was without jurisdiction to divest Mrs. Seals or Holloway of title, and vest it in complainants, by mode of redemption. For this error, the decree must be reversed.

Reversed and remanded.

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Special Action for Damages, by Mortgagee of Crops, against Purchaser with Notice of Lien.

1. *Whether conveyance is mortgage or crop-lien for advances.*—An instrument conveying the crops to be grown during the year, in form declaring a statutory lien for advances made and to be made (Code, §§ 3286-7), is effective only as a mortgage, on proof that it was given to secure an antecedent debt, and that no advances were in fact made on the faith of it.

2. *Description of personal property conveyed.*—A mortgage which conveys "all of the crops of corn, cotton and cotton-seed, and crops of every other name and description, to be grown this year in said county," is not void for uncertainty, but is valid and operative to convey all the crops grown in said county by the grantor or mortgagor.

3. *Conflicting liens for rent, advances, and under mortgage of crops.* The landlord's lien for rent (Code, § 3467) is superior to that of a mortgagee of the crops, though the mortgage was given before the beginning of the year; and if the landlord makes advances to enable his tenant to raise a crop, not only on the rented lands, but also on other lands owned by the tenant himself, taking a crop-lien note and mortgage (Code, §§ 3286-7), the lien of this instrument is superior to that of the prior

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mortgage, if the latter was given only for an antecedent debt; but the lien of the mortgage must prevail at law, against a note given for the unpaid purchase-money of land, though called rent, and payable in cotton, and assigned to the landlord of the maker.

4. *Action for damages, by mortgagee of crops; against landlord with prior lien.*—A mortgagee of crops grown on rented lands may maintain a special action on the case against the landlord, who, having notice of the mortgage, seized and sold the entire crop under his prior lien for rent and advances, the proceeds of sale exceeding the amount of his claim; and is entitled to recover the excess.

APPEAL from the City Court of Selma.

Tried before the Hon. JONA. HARALSON.

This action was brought by Posey Hamilton, against Maas & Brother, late partners in business; and was commenced on the 26th March, 1883. The complaint contained but a single count, which claimed \$1,000 as damages, for that one Robert Moore became and was indebted to plaintiff, on the 7th November, 1881, in the sum of \$400, for which he executed to plaintiff, on that day, his promissory note payable October 1st, 1882, and a mortgage to secure the payment of the same, "whereby he conveyed to plaintiff all crops of corn, cotton and cotton-seed, and crops of every other kind and description, to be grown by said Moore during the year 1882 in said county of Dallas; and said defendants, well knowing of said debt, and of the making of said note and mortgage, and for the purpose of preventing plaintiff from collecting his said debt, or getting the benefit of the lien given by said mortgage on the cotton raised by said Moore during said year, to-wit, ten bales of cotton, each weighing about 400lbs, and each of the value of \$50, did, to-wit, on the 1st day of November, 1882, take the said cotton into their possession, and wrongfully sell and dispose of the same; whereby plaintiff has been prevented from enforcing his lien on said cotton, and has lost his said debt." The cause was tried on issue joined on the plea of not guilty; and a trial by jury being waived, on all the evidence adduced, the court rendered judgment as on verdict for the defendants. The plaintiff duly excepted to this ruling and judgment, and he here assigns the same as error. The bill of exceptions purports to set out all the evidence in full, but it is only necessary to state the material facts bearing on the points decided by this court.

The plaintiff's mortgage was dated November 7th, 1881, and was duly filed for record in the Probate Court of Lowndes county, on the 3d December, 1881. It was in the form of a crop-lien for advances made and to be made, as evidenced by a promissory note for \$400; declaring "that said advances, or the amount thereof, shall be a lien on my crops grown on—plantation in—county, Alabama, the present year, 1882."

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The plaintiff, testifying as a witness for himself on the trial, admitted that no advances whatever were made under this instrument for the year; and stated that he only claimed \$242.30, the amount of Moore's antecedent indebtedness to him at the time the mortgage was executed. The property conveyed by the mortgage was thus described. "All of the crops of corn and cotton and cotton-seed, and crops of every other name and description, to be grown this year, 1882, in said county;" also, two horses, particularly described, one wagon, and a small parcel of land containing "twenty two (22) acres, more or less." The plaintiff admitted, also, that he had not foreclosed the mortgage on the horses. The mortgagor was not able to read or write, and his name to the mortgage was signed by mark only, which was attested by two witnesses, one of whom was the plaintiff's clerk and agent, by whom it was written, or the blanks in the printed form filled up at the time of its execution. It was a controverted question, whether the land was included in the mortgage by the authority of the mortgagor, or whether he knew that it was included when he executed the instrument; the plaintiff and his said clerk testifying affirmatively for him, while the mortgagor himself testified, as a witness for the defendants, that he did not intend to include the land, and did not know that it was included. The decision of this court renders it unnecessary to state the evidence bearing on this point.

It appeared that Moore cultivated three small parcels of land during the year 1882: 1st, the tract described in the mortgage to plaintiff, which was conveyed to him by W. A. Rice and wife, by deed dated 20th December, 1879, and of which he cultivated from fifteen to seventeen acres; 2d, a parcel of land called the "Lewis place," which the defendants rented, and then sub rented to him; 3d, a small parcel of land, which belonged to one T. B. Summerville, the defendants' clerk and agent, who had agreed to sell and convey it to said Moore, and Moore had paid \$100, one-half of the agreed price. The entire crop of cotton raised by Moore during the year 1882, on these three parcels of lands, was nine bales; and these were ginned and packed by one Underwood, for the defendants, and were received and sold by them. Underwood testified, as a witness for the plaintiff, to the weight of these several bales; and other witnesses for the plaintiff testified, that cotton was worth at that time about ten cents per pound. The defendants claimed the cotton under a mortgage and crop-lien for advances for and during the year 1882, which was in the same form, and conveyed the crops and horses by the same words, as the mortgage to plaintiff, but was dated January 2d, 1882; and they proved that they had made advances under this instrument

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amounting to \$238, besides \$41 for ginning, packing, &c. They also claimed \$50 for the rent of the land called the "Lewis place," which they had themselves leased from the owner for the year 1882, and sub-rented it to said Moore for \$50, taking his note for the amount, which was dated January 2d, 1882, and signed by said Moore, by which he promised to pay to said Summerville, on the 1st September, 1882, "two and one-half bales of cotton, to weigh 1,250 lbs., and to class middling, for rent of house and twelve acres of land for the year 1882, being the same house and land now occupied by" said Moore. This note was assigned by said Summerville to defendants "for value received," as the assignment recited, and the assignment was without date; but Summerville testified that it was made about the 1st February, 1882, in consideration of \$100 paid to him by defendants. As to the parcel of land mentioned in this note, it was shown that Summerville had sold it to Moore, about the beginning of the year 1880, or 1881, at the agreed price of \$200, one-half of which was paid in cash, and had executed a bond conditioned for titles to be made on payment of the balance, which fell due about December, 1881, or the 1st January, 1882. There were some negotiations between plaintiff and Moore about the payment of this balance, which resulted in nothing, because Moore wanted the title conveyed to his wife. The evidence as to these negotiations was contradictory, but it is not material to the points decided by this court. The money not having been advanced by plaintiff, a new contract was made between Moore and said Summerville, as each of them testified in substance; the bond for title was surrendered to Summerville, and the note for rent executed by Moore; and it further appeared that, after the payment or satisfaction of this note out of the cotton received by defendants, Summerville executed a deed for the land to Moore's wife.

The judgment on the evidence is the only matter assigned as error.

WHITE & WHITE, for the appellant.—The plaintiff's mortgage is not void for uncertainty in the description of the crops conveyed.—*Ellis v. Martin*, 60 Ala. 394. The defendants were chargeable with notice of plaintiff's prior lien.—*Boggs v. Price*, 64 Ala. 514. The plaintiff's right of action is supported by *Hussey v. Peebles*, 53 Ala. 432; *Collier v. Faulk & Martin*, 69 Ala. 58. If the defendants had a prior lien for rent or advances, it was incumbent on them to show the amount, and the particular cotton to which their lien attached; and they can claim no advantage from the confusion and intermingling of the cotton.—*Burns v. Campbell*, 71 Ala. 288. The note for unpaid purchase-money was not a lien on the crops.—58 Ala. 438.

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W. C. WARD, *contra*.—The plaintiff's mortgage purports to convey all the crops raised in Lowndes county during the year 1882, and is void for indefiniteness and generality of description.—Jones on Chattel Mortgages, §§ 55, 56, 63. It is void as to the crops raised on the "Lewis place," because that place was not rented by Moore when he executed the conveyance, and he had no potential property in any crop he might afterwards raise on it.—Jones on Chattel Mortgages, § 140. The instrument is supported only by an antecedent debt as its consideration, and has no effect as a crop-lien.—*Comer v. Daniel*, 69 Ala. 434; *Pearson v. Evans*, 61 Ala. 416. As against a mortgage, though of prior date, the defendant's lien for rent and advances must prevail.—Code, § 3467. On the evidence, Moore's note to Summerville, held by defendants as assignees, was a valid claim for rent, the original contract of purchase having been rescinded by the mutual agreement of the parties. These several sums aggregate more than the proceeds of sale of the cotton, at the price proved; and if there was any excess, plaintiff could not recover it in this form of action, the gist of which is the tortious or wrongful disposal of the cotton. As defendants had a prior lien and possession of the cotton, their sale of it was not unlawful; and if plaintiff has any remedy against them, it is by action for money had and received, or by bill in equity for an account. Nor does he show that he was injured by the sale of the cotton, since he has never foreclosed his mortgage on the horses.

STONE, C. J.—The conveyance to Hamilton simply secures an antecedent debt, and is therefore effective only as a mortgage. It is contended this mortgage is void, on account of its indefiniteness. The descriptive clause is in the following language: "All of the crops of corn and cotton and cotton seed, and crops of every other name and discription to be grown this year, 1882, in said county," [Lowndes county.] We think the plain import of this language is, that it conveyed the crops to be grown that year, in that county, by Moore, the mortgagor. This he could convey, and we will not impute to him the fruitless intention of attempting the impossible. It was a sufficient pledge of Moore's crop, to be grown that year in that county. *Ellis v. Martin*, 60 Ala. 394. Plaintiff made a sufficient *prima facie* case.

Maas & Brother had a valid crop-lien and mortgage duly recorded, and they made advances under section 3286 of the Code, which fastened a lien on the crop, superior to Hamilton's mortgage. They were also landlords of the lands known as the "Lewis place," and for the agreed rent, fifty dollars, had also a lien for that sum, on the crop grown on that land, which was

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superior to Hamilton's claim. The note for twelve hundred and fifty pounds of cotton, payable to Summerville, though called *rent*, was not rent. It was but a renewal of the unpaid purchase-money liability. As proof of this, the agreement was, that when that note was paid, Summerville was to make title to the land. Land-rent and purchase-money are not the same thing. The result of these principles is, that for the rent of the Lewis land, and for advances properly made by Maas & Brother, they were entitled to be first paid out of the cotton. Hamilton's right is superior to any other claim asserted by them.

The testimony in this record is, in some respects, wanting in precision. It is not shown precisely what sum of defendant's claim is for team, provisions and farming implements, or money with which to purchase the same; articles for which the statute secures a preferred lien. As we understand the testimony, these items amount to about \$238. For ginning, packing and hauling the cotton to market, or to the gin, \$41. Add the rent of the "Lewis place," \$50, and we have a total of three hundred and twenty-nine dollars, for which Maas & Brother have a first lien. Nor are we informed for what sum the cotton was sold. Underwood, the ginner, gives what he says were the weights of the bales, aggregating three thousand nine hundred and nine pounds. There is proof that cotton of this quality was then worth about ten cents a pound. This would give three hundred and ninety 90-100 dollars as the value of the cotton; an excess of more than sixty dollars over Maas & Brother's rightful first lien. On the testimony in this record, Hamilton was entitled to a judgment for that sum, with interest.

Reversed and remanded.

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Statutory Attachment by Landlord, for Advances.

1. *Verbal lease for one year, commencing at future day; attachment for advances.*—Although a verbal lease for the term of one year, to commence at a future day, is void under the statute of frauds (Code, § 2121); yet, if the tenant takes possession under the lease, and pays the rent as stipulated, this imparts validity to the contract, creates the relation of landlord and tenant between the parties, and gives the landlord a right to an attachment against the crop for advances made during the year.

2. *Statute of frauds; how pleaded.*—The statute of frauds as a defense, if not specially pleaded, is waived, and is not available under the general issue.

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APPEAL from the Circuit Court of Barbour.

Tried before the Hon. H. C. SPEAKE.

This action was brought by Columbus Martin, against Lemuel Blanchett, to recover the sum of \$300, alleged to be due to the plaintiff as landlord, for advances made by him to enable the defendant, his tenant, to make a crop on the rented lands during the year 1883; and was commenced by attachment against the defendant's crop, sued out on the 22d November, 1883, on the ground that the defendant had removed a part of the crop from the rented premises, without the consent of the plaintiff, and without paying for said advances. "On the trial," as the bill of exceptions states, "the general issue being pleaded, the plaintiff proved that, about the 1st December, 1882, he rented land to the defendant for the year 1883, for the agreed price of six bales of cotton. The proof showed, also, that the contract of renting was not in writing; that the defendant took possession of the land in December, 1882, two or three days after the contract was made, occupied and cultivated the same during the year 1883, and paid the six bales of cotton, agreed rent, from the crops grown on the rented lands that year. The proof showed, also, that after the 1st January, 1883, and while the defendant was in the use and occupancy of the lands, the plaintiff made advances to him to the amount of \$320, in a mule, money and provisions, to enable him to cultivate the land, gather, save and prepare the crop for market; and that the debt for said advances had not been paid. This was all the evidence in the case. The court thereupon charged the jury, at the request of the defendant, that the contract of renting, not being in writing, was void; that the relation of landlord and tenant did not subsist between the parties under said contract; that the plaintiff had no lien on the crop grown on the rented lands, for his advances; and that they must find for the defendant, if they believed the evidence." The plaintiff excepted to this charge, and he here assigns it as error.

J. N. WILLIAMS, and J. M. WHITE, for appellant.

H. D. CLAYTON, Jr., and A. H. THOMAS, *contra*.

SOMERVILLE, J.—The charge of the court was clearly erroneous. Admitting that the contract of renting between the parties was void under the statute of frauds, as a parol agreement for a lease for the term of one year, to commence *in futuro*, within the principle decided in *Crommelin v. Theiss & Co.* (31 Ala. 412); the defendant, nevertheless, went into possession of the premises, occupying under his verbal contract, and paid his rent to the plaintiff; and this act of recognition of

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the relation of landlord and tenant created a tenancy, and operated to impart validity to an agreement, otherwise deemed void, because not in writing and signed by the party sought to be charged.—*Singer Manufacturing Co. v. Sayre*, 75 Ala.; *Crawford v. Jones*, 54 Ala. 459; *Nelson v. Webb*, *Id.* 436. The record shows, moreover, that the statute of frauds was not specially pleaded, the only plea being the general issue. The benefit of the statute, therefore, was not available, but was waived.—*Shakspeare v. Alba*, 76 Ala. 351; *Cooper v. Hornsby*, 71 Ala. 62; *Comer v. Shehan*, 74 Ala. 452, 458; *Harris v. Miller*, 71 Ala. 26.

The contract of the defendant to pay for the advances made to him by the plaintiff was a valid legal promise, upon which an action would lie, and for the amount of which the plaintiff was entitled to the landlord's lien secured by section 3467 of the present Code, and the act amendatory thereof, approved February 12, 1879, with the remedy by attachment thereby afforded for its enforcement.

Reversed and remanded.

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Bill in Equity for Cancellation of Deed, as Cloud on Title.

1. *Cancellation of deed as cloud on title.*—A court of equity will not entertain jurisdiction of a bill for the cancellation of a deed as a cloud on the complainant's legal title, when he is out of possession, unless special grounds for equitable interposition are shown, but will leave the complainant to the assertion of his legal title in a court of law.

2. *Fraud as ground of equitable relief.*—Fraud is not, of itself, a ground for equitable interference, where the complainant has a legal title, and a full and adequate remedy at law; and the fact that her name was forged—was signed without her authority, knowledge, or consent—as grantor with her husband, to a conveyance of lands belonging to her statutory estate, of which the defendant is in possession, claiming under the forged deed, is no obstacle to a recovery at law, and, therefore, no special ground for equitable interference. (SOMERVILLE, J., *dissenting*.)

APPEAL from the Chancery Court of Dallas.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 17th November, 1883, by Mrs. Mary A. Peeples, the widow of Robert R. Peeples, deceased, against James H. Burns; and prayed the cancellation of a deed, under which the defendant held possession of a tract of land therein particularly described, which the complainant claimed as belonging to her statutory separate estate, as a cloud

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on her title to the land, and an obstacle to the assertion of her rights by action at law, and an account of the rents and profits received during the defendant's possession. The bill averred that, during the years 1869-73, said Robert R. Peeples was engaged in cultivating several plantations in Dallas and adjoining counties, and procured advances from Hudson, Kennedy & Co., a mercantile firm of which the defendant, James H. Burns, was a member, and, to secure the payment of said advances, executed to them a mortgage conveying said lands, with others, which belonged to complainant, his wife; that when this mortgage matured, on or about the 19th November, 1873, said debt being not satisfied in full, as claimed by the mortgagees, said R. R. Peeples executed and delivered to them a conveyance of all the lands described in the mortgage, in consideration of his supposed indebtedness to them; that complainant "did not sign said deed, nor did she authorize any one to sign the same for her, nor did she know until after the death of her said husband, which took place in September, 1882, that said lands had been conveyed to said Hudson, Kennedy & Co.;" that said deed was written by John F. Burns, who was the son of said James H. Burns; that Hudson, Kennedy & Co. conveyed all their interest in said lands, soon after the date of said deed, to said James H. Burns, who went into possession, received the rents and profits, and was in possession when the bill was filed; that the complainant did not discover, until a few weeks before her bill was filed, that the record of said deed showed that her name was signed to it as a grantor with her husband; and that the deed was a cloud on her title, depreciating the value of the lands, and obstructing the assertion of her title at law. The bill prayed, on these allegations, a cancellation of the deed, an account of the rents and profits, and for other and further relief under the general prayer.

The chancellor sustained a demurrer to the bill, and dismissed it, on motion, for want of equity; and his decree is now assigned as error.

S. W. JOHN, and E. W. PERTUS, for appellant, cited *Bunce v. Gallagher*, 5 Blatchf. 488; *Lockett v. Hurt*, 57 Ala. 198; *Boyleston v. Parrior*, 64 Ala. 564; *Shipman v. Furniss*, 69 Ala. 563.

SUMTER LEA, *contra*, cited *Daniel v. Stewart*, 55 Ala. 278; *Youngblood v. Youngblood*, 54 Ala. 487; *Insurance Co. v. Bush*, 13 Wall. 616; *Bassett v. Brown*, 100 Mass. 355; Story's Eq. Pl. § 476; 3 Wait's Actions & D. 191, § 156; *Sullivan v. Finnegan*, 101 Mass. 448; *Clouston v. Shearer*, 99 Mass. 209.

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CLOPTON, J.—Since *Daniel v. Stewart*, 55 Ala. 278, it has been the settled doctrine of this court, that a bill in equity to remove a cloud upon the title to land can not be maintained by a party asserting a mere legal title, against a defendant in adverse possession under color of title, without showing special grounds for equitable interposition. Such bill lies only in favor of a person in possession, who consequently can not bring an action to have the apparent title of the adversary claimant adjudicated at law. While it is not necessary that, under all circumstances, the party must be in possession to entitle a resort to equity, the legal title must be held under such circumstances that the law can not afford full and adequate relief. 3 Pom. Eq. Jur. § 1399, n. 4, in which the author observes: “But, when the estate or interest is legal in its nature, the exercise of the jurisdiction depends upon the adequacy of legal remedies. Thus, for example, a plaintiff out of possession, holding the legal title, will be left to his remedy by ejectment, under ordinary circumstances.” And in 2 Lead. Cas. in Eq. 1355, after speaking of the principle on which relief is granted in the matter of cancellation, it is said: “The principle does not ordinarily apply to real estate, because the complainant may bring a writ of entry, or ejectment, and compel the defendant to maintain his title, or to disclaim.” Equitable interference, in such cases, rests on the principle of *quia timet*, which will not be applied in support of a bill brought by a party out of possession, whose title is merely legal. After having recovered possession by ejectment, or otherwise, if there is danger, or well-grounded apprehension, that the apparent title will be used annoyingly, oppressively, or injuriously, resort may be had to equity to cancel it, remove the cloud, and quiet the title. The rule is based on the fullness, sufficiency, and adequacy of the legal remedy by ejectment, and on the absence of equity jurisdiction to try a naked question of legal title to real estate.

The rule may be regarded as settled in this State, that a party can not go into a court of equity on the ground of *mere* fraud,—that the mere intervention of fraud, no discovery or any special equitable relief being sought, will not authorize a court of equity to grant relief, or to entertain concurrent jurisdiction with the court of law, in cases cognizable at law.—*Knotts v. Tarver*, 8 Ala. 743; *Younghlood v. Younghlood*, 54 Ala. 486. The same rule has been since repeatedly affirmed, although there are expressions in some cases inconsistent with the doctrine.—*Smith v. Cockrell*, 66 Ala. 64. The doctrine has been so elaborately and fully discussed, that further discussion is not required, and will not be productive of any benefit. We are not at liberty to depart from it; and are content to repeat what was said by WALKER, C. J., in *Dickinson v. Lewis*, 34

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643 : "The doctrine of this court is, that notwithstanding the fraud, if the party can have full, complete, and adequate redress at law, he can not go into chancery. By that doctrine, as expounding a just and convenient rule, too long recognized in this State to be lightly departed from, we will abide, without inquiring whether it harmonizes with all the decisions upon this subject."

The general rule does not seem to be controverted ; but it is contended, that the name of complainant having been signed to the deed without her authority, consent, or knowledge, constitutes a fraud upon her, and is special ground for equitable interposition. The bill does not charge that the grantees or either of them committed the fraud, or participated in, or had any knowledge thereof. It being the rule, that the actual fraud of the person in possession is not, of itself, the subject and ground of equity jurisdiction, and will not support an appeal to a court of equity by a person out of possession to remove a cloud upon the title, cast by a deed procured by such fraud ; jurisdiction for such purpose will not be entertained in favor of a party out of possession, on the ground of fraud committed by a third person in procuring the deed, or having it signed, who did not represent the grantee, and the grantee was ignorant of the fraud when he received the conveyance. If a fraud perpetrated by a person against whom the cancellation is sought, or with which he, or those under whom he claimed had some connection, or knowledge thereof, is not a sufficient ground, there can be no well founded reason why forgery of a deed by a third person should be enough to invoke equitable interposition. Under our rule, the party in such case will be left to his legal remedies.

The complainant is out possession. The bill does not show any obstacle to a recovery at law, or any reason why the law can not afford her full and adequate redress, and no special ground of equity is alleged. It is a bill to try, in a court of equity, the genuineness and validity of the purported conveyance, and to be let into possession. The complainant claims to hold a purely legal estate, and seeks to have adjudicated the alleged legal title of an adverse claimant and possessor, and to recover possession, without showing any special equitable features. In such case, the remedy at law is adequate, and the concurrent jurisdiction of equity does not attach. We concur with the chancellor, that the bill is without equity.

Affirmed.

SOMERVILLE, J., dissenting.

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Bill in Equity by Assignee of Insolvent Bank, asking Instructions in matter of Trust; Cross-Bill by Creditors claiming Preference.

1. *Payment of bill as between drawer and discounting bank.*—When a bank has discounted a bill of exchange for the drawer, and still retains the ownership and control of it, an acceptance of a conveyance of property from the drawer, in absolute discharge of his liability, extinguishes the bill as a legal liability.

2. *Indorsement for collection.*—An indorsement of a bill or note for collection only—as by the words, “Pay to W. D. & Co., for account of Bank of Mobile,” accompanied with a letter of advice that the bill was remitted for the credit of the remitting bank—does not change the ownership of the bill or note, but it remains the property of the remitting bank.

3. *Advancing money on faith of bill so held.*—If the bank to whom a bill or note is thus remitted for collection, having the possession, on the faith and credit thereof advances money to the remitting bank, or accepts its drafts in anticipation of the collection, either by express agreement, or in accordance with the usual course of dealing between them; as to whether it thereby acquires a lien on the bill or note, or an interest therein which will support its custody as rightful against the remitting bank, until the advance or acceptance is repaid, see authorities cited.

4. *Wrongful payment, and ratification thereof.*—If the drawer of the bill, having notice of the fact that the discounting bank has transferred it for collection to its business correspondent, and that the latter has acquired a lien by advancing money on the faith of it before maturity, pays the bill to the discounting bank, the payment is wrongfully made, and wrongfully accepted, and does not discharge the drawer from liability to the bank or person having the lien, unless ratified; and if the payment was made in property, which remains in specie, the discounting bank holds such property in trust for its correspondent, if the latter elects to ratify the payment.

5. *Same; election.*—When a party has a right to elect whether he will ratify or disaffirm a wrongful payment, he must either ratify or disaffirm it as an entirety: he can not, while suing the original debtor, maintain an action against the person to whom the money was paid, or fasten a trust on the property received by him in payment; though, if the property was merely received as collateral security for the debt, he may pursue it in equity, and at the same time maintain an action at law against the debtor.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. JOHN A. FOSTER.

The original bill in this case was filed on the 29th August, 1884, by Winston Jones, as assignee, or trustee, in a deed of assignment executed by the Bank of Mobile for the benefit of its creditors, against the said corporation and its creditors; ask-

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ing that the court would take jurisdiction of the trust, instruct the complainant in the discharge of his duties, require all the creditors to come in and propound their claims, settle all conflicting liens and claims, and administer the assets as required by law and the rules of equity.

The Bank of Mobile was first chartered, under the corporate name of the "president, directors and company of the Bank of Mobile," by an act of the Territorial Legislature, approved November 18th, 1818; but its corporate existence was continued, under a new and amended charter, by an act approved December 14, 1876. The deed of assignment, a copy of which was made an exhibit to the bill, was dated the 8th July, 1884; and conveyed all the property and assets of the bank to said Winston Jones, as trustee, "for the benefit of all the creditors of said bank, without preference to any creditor, or class of creditors, unless by law there is or shall be a preference given in any particular case, which would operate to control the action of the said assignee in such particular premises." A list of the individual depositors of the bank, over four hundred in number, was appended to the bill as an exhibit, and it was alleged that the property and assets conveyed by the assignment were worth nearly \$500,000.

Among the property conveyed were two large tracts of land, one situated near the city of Mobile, and the other in Jackson county, Mississippi, on each of which a valuable saw-mill with appurtenances was situated; and there was a large quantity of logs and lumber, of the estimated value of \$80,000. This property was taken by the bank, as the bill alleged, from the Danner Land and Lumber Company, a private corporation, of which A. C. Danner was the president and principal stockholder, "at an aggregate value of \$162,000, in settlement of a debt due from said company to said bank for certain discounts and overdrafts, and also in settlement of certain sterling exchange drawn by said company, at Mobile, on George Shadboldt & Son, London, England, to an amount exceeding \$100,000; and which exchange had been bought by said bank, and had been accepted, as orator is informed and believes, and so avers, by said Shadboldt & Son, but which acceptances, at the time of said settlement, your orator charges on information and belief, said Shadboldt & Son were unable to meet." A claim to this property, the bill alleged, was asserted by Williams, Deacon & Co., a banking house in London, as the holders of said accepted foreign bills, the averments as to their claim being in these words: "For some years past, said bank had business connections with said Williams, Deacon & Co., and at the time of said assignment, as your orator avers on information and belief, was indebted to them in a large sum, the

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exact amount of which, pending the adjustment of the account, your orator is unable to give. But your orator shows that, at the time of said assignment, said drafts of the Danner Land and Lumber Company, accepted by said Shadboldt & Son, were held by said Williams, Deacon & Co., and that said acceptances have been, in whole or in part, protested. Your orator does not know the exact title or legal interest of said William, Deacon & Co., in said drafts; but he is advised and believes that said bank, prior to said assignment, assumed to pay said drafts, and would have done so, as your orator believes, but for the failure of said bank as aforesaid. Said Williams, Deacon & Co. claim, by their attorneys, as your orator shows on information and belief, that the amount of said drafts so held by them are the first lien on, or are entitled to a preference of payment out of the proceeds which may be realized by your orator from the sale of said property so taken from said Danner Land and Lumber Company; but your orator knows of no fact or equity upon which said claim, or said drafts in whosoever hands they may be, can be charged as a first lien on, or be held entitled to preference out of the proceeds of said property."

Williams, Deacon & Co. thereupon filed an answer and cross-bill, the material parts of which, or the substance thereof, are as follows: (1.) Respondents have been carrying on a banking business in London for many years, "and have had dealings with said Bank of Mobile for over forty-five years; but said dealings were thought by them to be secured by the bank remitting to them collaterals to cover their drafts, as herein-after stated; besides, they had confidence in the integrity of the bank officials, and in the solvency of the corporation." (2.) The Danner Land and Lumber Company, a private corporation under the laws of Alabama, was largely engaged in the manufacture and shipment of lumber and sawn timber for English and European markets; and it drew sundry bills of exchange on George Shadboldt & Son, wood-brokers, residing and doing business in London, to whom it also shipped cargoes of lumber and limber. "Said bills were drawn at sixty days after sight, and were duly accepted by said Shadboldt & Son on presentation. At the time said bills were drawn, said Danner was also president of said Bank of Mobile, and was actively engaged in the management of the affairs of said bank, as well as of said corporation. J. C. Strong, the secretary and treasurer of said company, drew said bills, by the instructions of said Danner, in large amounts, and at short intervals. These bills were lodged in the Bank of Mobile by said Danner, president of said company, and were ordered to be discounted by him as president of said bank, and the proceeds to be placed to the credit of said company; and said Danner, as president of

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said bank, ordered and directed said bills to be remitted to Williams, Deacon & Co., to be collected at maturity, and at the same time, as president of said bank, ordered and directed that bills of exchange be drawn by said bank, generally at sixty days, and sometimes at sight, on Williams, Deacon & Co., to cover amount of said bills; and further ordered, that whenever, by the regular course of the business of the bank, foreign exchange was not sold in sufficient amount to cover these bills, that said bank should then draw exchange in its own favor on respondents, and send the same to its correspondent bank in New York, in sufficient amounts to cover any balance on said bills which might at maturity come into the hands of Williams, Deacon & Co., on payment of said bills. This was done, and all such exchange was paid by respondents; and large sums of money were thus drawn from respondents, and deposited in New York, on which said bank drew its domestic exchange." (3.) If this course of dealing was not expressly ordered by said Danner in his official capacity, it was done by his subordinate officials, with his knowledge and consent, and was ratified by him; and said lumber company "got the full benefit thereof, and these respondents paid all said drafts of the bank, to the full amount of said foreign bills which they were drawn to cover." (4.) "In furtherance of this scheme, as president of both corporations, to obtain money from these respondents to keep up said lumber company, and to keep said bank in funds, said Danner caused said bills to be drawn at sixty days after sight, and procured their acceptance by said Shadboldt & Son, to whom said company consigned its lumber and timber sent to England for sale." (5.) Said bills, now unpaid, amount in United States currency to \$110,226.23, besides interest, which were thus discounted by said bank, and sent to these respondents, who are *bona fide* holders thereof for value paid and advanced to said bank before the maturity of said bills." (6.) After said bills had been thus drawn, discounted, and accepted, and after these respondents became the holders thereof for value, and after said bank had drawn for the full amount thereof on these respondents, and they had paid the same, said Shadboldt & Son announced their determination, about the 9th July, 1884, not to pay the same to respondents, stating that they had received instructions from the bank and the company not to pay, as certain transactions had occurred between them, as drawer and indorser of the bills, by which the bank had assumed to pay the bills, and had released the drawer and acceptors from liability. "Respondents at once denied the right of said bank and said lumber company to make any contract whereby the rights of respondents, who were then and now the *bona fide* holders for value of all said bills,

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could be affected or impaired, without their consent. Said bills were, at that time, all in the hands of respondents, and held by them against exchange drawn by said bank and paid by respondents. Neither said bank nor said lumber company ever demanded said bills of respondents, nor undertook to control them, or claimed the right to control them." As said bills matured, they were protested, and respondents notified all the parties that they would look to each of them for payment. (7.) The transactions between the bank and the lumber company, which resulted in the execution of the latter's conveyance of the property, are stated on information and belief. (8.) The bank took the property in payment of the liability of the lumber company, "the bank being ultimately liable to pay said foreign bills, having passed them to respondents prior thereto, and drawn the full amount thereof in advance of their maturity. As soon as said sale and conveyance were made, said Danner, as president of said two corporations, notified said Shadboldt & Son, the acceptors, not to pay any of said bills at maturity, asserting that the drawer had paid here; he well knowing, as president of said bank and said lumber company, that respondents held said bills, and that said bank had drawn its exchange to the full amount of the proceeds thereof, and that respondents had paid the same, and that said bank had the money in its coffers, or under its control, and that respondents were the *bona fide* holders for value of all of said bills; and that the indorsement thereon by said Manly, cashier, was only the form he had put thereon to identify the sender on the face of the bill, which was done with the knowledge and direction of said Danner, and that said form only meant that, if said bills were paid, said bank would be entitled to a credit therefor on its exchange account with these respondents; and that these bills were remitted to these respondents for the purpose of being held by them as their property, and the proceeds, if collected, to be credited on said exchange account. Accompanying each of said bills, as the same was remitted by first mail after discount thereof by the bank, the said bank, by R. F. Manly, its cashier, inclosed the same in its letter of advice, informing those respondents that each of said bills was remitted for its credit. Respondents agreed to receive them for its credit, and so entered them on their books, and have ever since held them as their property; and such was the course of dealing between said bank and these respondents." (9.) "Said bank thus received from the drawer of said bills payment of the same in property, after the assignment of said bills to these respondents, and contracted for said consideration to release the drawer from liability, after said bank had assigned said bills to these respondents, and had received from them full

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value therefor; and said bank thereby made itself the trustee of these respondents in reference to said property, and liable to account to them for the full value thereof; and said Jones, said assignee, was then and there a director of said bank, and was one of the persons appointed by it to negotiate and receive said property for it, and was active in said transaction, and participated in the same in all its details, and had full knowledge of the whole transaction, and took said property by said assignment charged with said trust." (10.) All the property conveyed by the deed of said Danner Land and Lumber Company "was its exclusive property, and was conveyed by it for the express and only purpose of paying its liability to said bank, as evidenced by these foreign bills. All the balance of the liabilities of said company was in the shape of discounts and over-drafts held and owned by said bank, which were surrendered at the time of the delivery of this property; but, these foreign bills not being held or owned by said bank, which said Danner well knew, said bank never undertook to surrender or deliver the same, and was powerless to do so, if it had, save by paying to respondents the amounts thereof."

On these allegations, the claim and prayer of said complainants in the cross-bill was thus stated: "The facts above set forth, which these respondents are ready to verify, give them a prior equity over other creditors of said bank, on the said property, for the satisfaction of their said claim, because said Danner Land and Lumber Company was the common debtor of said bank and these respondents at the time said property was conveyed to the bank for the purpose of paying said debt. Respondents deny that the depositors of said bank have any preference of payment, in law or in fact, over them, out of the other assets of the bank so alleged in said bill; and they claim that said assignee, by virtue of his authority under said deed of assignment, should pay them, on their said claim, the same percentage as depositors and note-holders, after first selling said real estate, logs and lumber, and applying the same to the payment of said debt. Respondents have brought suit, in the Queen's Bench in London, England, against said Shadboldt & Son as the acceptors of said bills, and against said Danner Land and Lumber Company, as drawers of said bills, in the Circuit Court of the United States for the Southern District of Alabama; which said suits at law are now pending, and when said trustee sells said property, and applies the proceeds thereof to the payment of said bills, said drawer and acceptors will then be entitled to a credit to the extent of the payment so made on their aforesaid liabilities. . . . Respondents therefore pray, as complainants in this cross-bill, that said Jones be held and treated as a trustee for them, as to all of said property so

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conveyed to said bank by the Danner Land and Lumber Company; and that he be directed to sell the same, and pay over to your orators, or to their solicitors, the proceeds thereof, or so much thereof as these bills are in proportion to the whole value of the property, or the amount realized thereon; and that he be required to account to them for any of said property heretofore sold, or the rents, income, and profits thereof; . . . and if said property be insufficient to pay said sum to your orators, that said assignee be directed to pay them the balance thereof out of the other assets of said bank, unless, in the meantime, said balance, if any, be paid by said drawer or acceptors of said bills."

The indorsement of each of the bills was in these words: "*Pay to Williams, Deacon & Co., for account of the Bank of Mobile;*" which was signed, "*R. F. Manly, cashier.*" The letter of advice accompanying each bill, which was also signed by said Manly as cashier, was in these words: "*I inclose for our own credit, 17, 613, George Shadboldt & Son, £1,800. Second of exchange will follow. Please report by number.*" It appeared, also, from the statements of the cross-bill and exhibits thereto, that the Bank of Mobile had an open credit with Williams, Deacon & Co., to the amount of £10,000, for which they held, as collateral security, Alabama bonds, class No. 2, to the amount of \$60,000.

The chancellor sustained a demurrer to the cross-bill, and dismissed it; and his decree is now assigned as error.

OVERALL & BESTOR, for the appellants.—(1.) The original parties to the transactions here involved are before the court, and the rights of no third parties are concerned. On the allegations of the bill, which are admitted by the demurrer, the property was conveyed to the bank, and was accepted by it, for the express purpose of discharging the drawer's liability on these foreign bills; and this was done before the maturity of the bills, and when both of the parties knew, Danner being the president and principal manager of each corporation, that the bank had already realized the amount by exchange drawn on the appellants, and that the bills were held by the appellants as security for the money thus advanced on the faith of them. The bank had already received payment of the debt, when it sold its exchange on appellants; and when it received this property in discharge of the debt, it was bound to apply the proceeds for that purpose. A court of equity will hold the bank and its assignees chargeable as trustees for the benefit of the holders of the bill, without regard to the form of the agreement. The trust arises by implication of law, from the nature of the transaction.—*Newlin v. McAfee*, 64 Ala. 365; *Powell*

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v. Jones, 72 Ala. 398; *Ellis v. Amason*, 2 Dev. Eq. 278; 2 Fonb. Eq. 623; 1 Perry on Trusts, §§ 243, 247, 438; 2 Story's Equity, §§ 1264-5; *Fortescue v. Barnett*, 3 My. & K. 36. The property can not be held by the assignee, except as a trustee for the owner of the debt; and his refusal to apply it for that purpose would constitute a fraud, out of which a court of equity raises a trust.—*Patton v. Beecher*, 62 Ala. 590. If the bank had remained solvent, and had refused to pay the debt, Williams, Deacon & Co. might have maintained an action at law against it (*Seaman v. Hasbrouck*, 35 Barbour, 151); and the insolvency intervening, they may follow the specific property in equity. (2.) Williams, Deacon & Co. had possession of the bills, claiming to be *bona fide* holders for value, having advanced the full amount to the bank; and the latter made no attempt or promise to deliver them, either to Shadboldt & Son, the accommodation acceptors, or to the Danner Company; nor did the latter stipulate for their delivery, Danner well knowing all the facts. Possession is evidence of ownership, and a party who makes payment to one who has not the possession, acts at his peril, and is not discharged from liability to the holder.—2 Dan. Neg. Instr. § 1228; *Fellows v. Harris*, 12 Sm. & Mar. 462; *Emanuel v. White*, 34 Miss. 56; *Mercier v. Cotton*, 34 Miss. 64; *Goodman v. Simond*, 20 Howard, 343; *Comm'rs v. Clark*, 94 U. S. 285; *In re Tallassee Man. Co.*, 64 Ala. 593; *Collins v. Gilbert*, 4 U. S. 754; *Davis v. Miller*, 14 Gratt. 10. (3.) The bills were not only sent for collection, but, as the accompanying letter of advice stated, "for credit," the collection having already been anticipated; and by the course of dealing between the parties, as shown by the allegations of the cross-bill, Williams, Deacon & Co. had the right to hold them until reimbursed.—*Sweeney v. Easter*, 1 Wallace, 166; *Brown v. Jackson*, 1 Wash. 515. (4.) Even if the bills were remitted for collection only, Williams, Deacon & Co. had a banker's lien upon them, which made them holders for value as against the bank and the drawer.—*Morse on Banking*, 423; *Maitland v. Nat. Bank*, 40 Md. 540; *Lehman Bros. v. Tallassee Man. Co.*, 64 Ala. 595. As holders for value, they are entitled to protection against all subsequent transactions between the prior parties.—*Boykin v. Bank*, 72 Ala. 271; *Miller v. Boykin*, 70 Ala. 469; *Connerly v. P. & M. Bank*, 66 Ala. 432; *Swift v. Tyson*, 16 Peters, 1; *Collins v. Gilbert*, 94 U. S. 753. (5.) That an appeal will lie in this case, see *Winn v. Dillard*, 60 Ala. ; *Brooks v. Woods*, 40 Ala. 538; *Trustees v. Greenough*, 105 U. S. 527.

GAYLORD B. CLARK, for the Bank of Mobile and its assignee, Jones; J. L. SMITH, T. A. HAMILTON, and HANNIS TAYLOR,

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for creditors and depositors of the bank; and PILLANS, TORREY & HANAW, for the Danner Land and Lumber Company, submitted oral arguments and printed briefs, in which the following points were made, and the following authorities cited: (1.) The indorsement of the bills by the bank to Williams, Deacon & Co., was for collection only, and neither changed the ownership of the bills, nor conferred any rights on Williams, Deacon & Co. as against the bank.—1 Danl. Neg. Instr. §§ 666-69; *Nat. Bank v. Reno County Bank*, per McCrary, J., 3 Fed. Rep. 257; *Hook v. Pratt*, 78 N. Y. 371; *White v. Bank*, 102 U. S. 658; *Sweeney v. Easter*, 1 Wallace, 166; Edwards on Bills & Notes, § 277; 3 N. Y. 494; *Atkins v. Cobb*, 56 Geo. 86; *Lloyd v. Sigourney*, 5 Bing. ; *Clafin v. Wilson*, 51 Iowa, 15; 21 Minn. 383; 2 Murph. N. C. 138; Chitty on Bills, 258-61; 2 Burr. 1227; *Wilson v. Holmes*, 5 Mass. 543; *Truettel v. Barandon*, 8 Taunton, 100; *Blaine v. Bourne*, 11 R. I. 119; *Mech. Bank v. Valley Pack Co.*, 4 Mo. App. 200. (2.) Neither the letter of advice, nor the course of dealing between the parties as alleged, changed the legal effect of the indorsement; nor could it be changed by any parol evidence or custom.—*Giles v. Perkins*, 9 East, 12; *Scott v. Ocean Bank*, 23 N. Y. 289; *White v. Nat. Bank*, 102 U. S. 660; *Day v. Thompson*, 65 Ala. 269; *Preston v. Ellington*, 74 Ala. 133; *Cowles v. Townsend*, 31 Ala. 133; *Hightower v. Ivey*, 2 Porter, 308; *Carleton v. Fellows*, 13 Ala. 437; 1 Wait's Ac. & D. 593-97; *Tucker v. Fairbanks*, 98 Mass. 102; *Bartlett v. Hawley*, 120 Mass. 92; *Tankersley v. Graham*, 8 Ala. 250; 8 Taunton, 92. In this connection it must be remembered that the demurrer admits the allegations of the bill only so far as they are well pleaded, and the averment of a legal conclusion can not be treated as a statement of fact.—*Goldsby v. Goldsby*, 67 Ala. 562; *Cockrell v. Gurley*, 26 Ala. 408; *Gilchrist v. Shackelford*, 72 Ala. 13; *Rapier v. Paper Co.*, 64 Ala. 340. (3.) No express trust, created by the agreement of the parties, is claimed, or alleged; and none arises by implication of law from the facts stated.—1 Perry on Trusts, §§ 73, 133, 165; 7 Conn. 478; 20 Conn. 427. If the property had been received, not in absolute payment, but as security for the debt, they might have compelled its appropriation for that purpose.—19 Ala. 798; 16 Ala. 417; 60 Ala. 555; 67 Ala. 425. (4.) But, if any trust might be implied in favor of Williams, Deacon & Co. at their election, they have lost the right to claim it. They have brought actions at law against the drawer and the acceptors of the bill, and can not at the same time pursue the property, thereby ratifying the payment.—Wharton on Agency, §§ 72, 78, 89; 2 Perry on Trusts, 600; 1 Wait's Ac. & D. 232; 27 Mo. 163; *Widner v. Olmstead*, 14 Mich. 124; *Lehman v. Meyer*, 67

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Ala. 403; *Moog v. Talcott*, 72 Ala. 211; *Micon v. Ashurst*, 55 Ala. 612; *Rives v. Walthall*, 38 Ala. 382; *Hatchett v. Blanton*, 72 Ala. 423.

STONE, C. J.—Williams, Deacon & Co. are bankers in the city of London, England, and as such have been business correspondents of the Bank of Mobile for more than forty years. The cross-bill makes substantially the following case; One line of the business of the Bank of Mobile has been the purchase by discount of bills of exchange payable abroad, which, when collected, produced and placed a fund, on which the Bank of Mobile drew and sold foreign exchange. It has long been in the habit of remitting its purchased bills, payable abroad, to Williams, Deacon & Co., indorsed to them for collection, and has also been in the habit of drawing on them in the sale of foreign exchange, which drafts the said foreign bankers honored and met. The practical working has been, that the Bank of Mobile paid out its money in the discount and purchase of such bills, and received it back, *plus* the profits of the two operations, when it sold exchange against the proceeds of the bills. Williams, Deacon & Co. realized funds, the property of the Bank of Mobile, when they collected the bills thus remitted to them for collection; and they discharged the liability and accounted and repaid to the Bank of Mobile, when they honored and paid the checks or drafts of the latter, in amount equal to the sum of the collections. Strong confidence had grown up between the parties, and Williams, Deacon & Co. would and did honor and pay drafts drawn on them by the Bank of Mobile, before the maturity, and consequently before the collection of such bills remitted to them for collection; and when, in the fluctuations of trade, a surplus of collections accumulated in the bank of Williams, Deacon & Co., not wanted to meet the demand for foreign exchange, the Bank of Mobile would and did transfer such surplus from Williams, Deacon & Co. to its correspondent bank in the city of New York, U. S., as a fund against which to issue its domestic exchange.

The averred facts in reference to the particular transaction, on which the cross-bill is sought to be maintained, are as follows: There was a private corporation, known as the Danner Land and Lumber Company, engaged in the manufacture and shipment of lumber to foreign markets. A. C. Danner was president of the company, and was the largest stockholder. He was also president of the Bank of Mobile. Shadboldt & Son, wood-brokers in London, England, were brokers for the sale of the lumber and timber shipped by the Danner Land and Lumber Company to that market. They were also in the habit of accepting the bills of exchange drawn by said Lumber Com-

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pany. Commencing on the 10th May, 1884, and ending on the 19th of June next afterwards, the Danner Land and Lumber Company drew its fifteen bills of exchange on Shadboldt & Son, for an aggregate sum which amounted to about one hundred thousand dollars in American currency. These bills became due and demandable at an average of about seventy-five days after their several dates, beginning July 26, and ending September 5, 1884. They were accepted by Shadboldt & Son. The averment of the cross-bill, as to what was done with these bills, is as follows: "These bills were lodged in the Bank of Mobile, by A. C. Danner, president of the Danner Land and Lumber Company, and were ordered to be discounted by said Danner as president of said bank, and the proceeds to be placed to the credit of his Land and Lumber Company; and said Danner, as president of the Bank of Mobile, ordered and directed said bills to Williams, Deacon & Co., to be collected at maturity, and at the same time ordered and directed, as president of said bank, that bills of exchange be drawn, generally at sixty days, and sometimes at sight, by said bank on Williams, Deacon & Co., to cover amount of said bills; and further ordered that, whenever, by the regular course of the business of said bank, foreign exchange was not sold in sufficient amount to cover these bills, that said bank should then draw exchange in its own favor on respondents [Williams, Deacon & Co.], and send the same to its correspondent bank in New York, in sufficient amounts to cover any balance on said bills, which might at maturity come into the hands of Williams, Deacon & Co., on payment of said bills. This was done, and all such exchange was paid by respondents. Large sums of money were thus drawn from respondents and deposited in New York, on which said bank drew its domestic exchange." The averments of the cross-bill are not always as specific as could be desired; but the effect of the foregoing, and other averments not necessary to be copied, is, that based on these fifteen bills of exchange, accepted by Shadboldt & Son, so remitted by the Bank of Mobile to Williams, Deacon & Co., the remitting bank, in anticipation of the maturity and collection of the bills, had drawn on Williams, Deacon & Co., and thus realized the entire sum to be collected from Shadboldt & Son, on their acceptances of said bills; and this before there was any known trouble in the financial affairs of the Bank of Mobile.

The cross-bill further sets forth that, including these fifteen bills of exchange so discounted by the Bank of Mobile, the Danner Land and Lumber Company owed the bank one hundred and sixty-two thousand dollars, which the Land and Lumber Company, about July 1, 1884, paid, satisfied and discharged to the Bank of Mobile, by conveyance of real and personal

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property, in full satisfaction of said entire liability. By this averred transaction, if true, the Land and Lumber Company was no longer liable to pay the said fifteen bills, or any part of them, to the Bank of Mobile; and if the said bills were then the property of the bank, and under its control, with authority to receive payment, the bills were thereby paid, and extinguished as a legal liability.

Williams, Deacon & Co. claim that, before said bills of exchange became due, they became their property by *bona fide* purchase, and the Danner Land and Lumber Company and the Bank of Mobile had no authority to make and accept said alleged payment to the Bank of Mobile. The indorsement of the said bills by the Bank of Mobile was in the following words: "Pay to Williams, Deacon & Co., for account of Bank of Mobile." The cross-bill alleges that, "accompanying each of said bills, as the same was remitted by the first mail after the discount thereof by the bank, the said bank, by its cashier, R. F. Manly, inclosed the same in its letter of advice, informing complainants that each of said bills was remitted for its credit; that complainants agreed to receive them for its credit, and so entered them on their books, and has ever since held them as their property."

As we understand the averments of the cross-bill, the bills did not pass into the hands of Williams, Deacon & Co. as purchasers, but as agents to collect. Such is the import of the restrictive indorsements placed on the bills. The bills then, if there be nothing else in the transaction, remained the property of the Bank of Mobile, and could have been recovered by it from Williams, Deacon & Co., if it had chosen to assert its right.—*Ex parte Pease*, 19 Vesey, 25; 1 Dan. Neg. Sec. § 698; *Sweeny v. Easter*, 1 Wall. U. S. 166; *White v. Nat. Bank*, 102 U. S. 658; *Blaine v. Bourne*, 11 R. I. 119; *Trentel v. Barandon*, 8 Taunt. 100; *Wilson v. Holmes*, 5 Mass. 543; *Hook v. Pratt*, 78 N. Y. 371; *Atkins v. Cobb*, 56 Ga. 86; *Edie v. East India Co.*, 2 Burr. 1216, 1227; *Brown v. Jackson*, 1 Wash. Cir. Ct. 512; *Tucker Man. Co. v. Fairbanks*, 98 Mass. 101; *Mech. Bank v. Valley Packing Co.*, 4 Mo. App. 200; s. c., 70 Mo. Rep. 643.

The transaction, however, did not end here, if the averments of the cross-bill be true. Based on the possession of these accepted bills, soon to mature, and, as was confidently expected, soon to be collected, and based on the letter of advice and course of dealing between the parties, Williams, Deacon & Co. had permitted the Bank of Mobile to anticipate the collection, and, through its drafts, to realize the proceeds of the bills before their maturity or payment. Is this distinguishable, in principle, from any other advance of money, procured on the faith

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of collaterals held by, or deposited with the lender? Has not the lender a lien on the collateral, which will maintain his rightful custody against the borrower, until the advance or loan is reimbursed? Could the Bank of Mobile, after its advance-draft and realization of the proceeds of the bills, have recovered them from Williams, Deacon & Co., without first repaying to them the sum advanced by them on the faith of their collection? And does Winston Jones, the assignee, stand in any better right, than the Bank of Mobile, his assignor? He is the mere transferree of the title, for the benefit of creditors, and is not a purchaser in the sense which will cut off equities between the parties, although unknown to him. We have asked the questions above, with no intention of answering them. The reason will be stated further on.—Morse on Banking, 42-3; Perry on Trusts, §§ 161, 243; *Mich. St. Bank v. Gardner*, 15 Gray, 362; *Ullman v. Barnard*, 7 Gray, 554; Story's Equity, § 1265; *Patton v. Beecher*, 62 Ala. 579; *Tankersly v. Graham*, 8 Ala. 247; *Newlin v. McAfee*, 72 Ala. 357; *Powell v. Jones*, 72 Ala. 392; *Ellis v. Amason*, 2 Dev. Eq. 273; *Legard v. Hodges*, 1 Vesey, 477.

There is another line of inquiry, cognate to that raised above. Taking the averments of the cross-bill for our guide, the Danner Land and Lumber Company was the principal debtor on the said fifteen bills, which gave rise to the present controversy. To it the consideration moved, and Shadboldt & Son were its accommodation acceptors. On it rested the duty of exonerating all other parties to the bills. Before the alleged payment of said bills by the said company to the Bank of Mobile, Williams, Deacon & Co. had acquired all the right they can assert to the proceeds of said bills, by meeting the advance-drafts of the Bank of Mobile. Danner, president of each corporation, had knowledge of the said lien held by Williams, Deacon & Co. on said bills, for it was under his direction the drafts had gone forward, and the proceeds, thus anticipated, had been turned into the coffers of the Bank of Mobile. Was this knowledge on the part of Danner, notice to each of the corporations of which he was president, of the nature and extent of the claim held by Williams, Deacon & Co. on the said bills? And, we may ask, what right had the Bank of Mobile to receive payment of the bills, incumbered as they then were? And what right had the Danner Land and Lumber Company to pay the bills to the Bank of Mobile, if chargeable with notice of Williams, Deacon & Co.'s lien? These inquiries raise the question, whether the Land and Lumber Company has discharged itself from the payment of the bills, by the alleged payment to the Bank of Mobile. It is not necessary we should decide this question.

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Taken in its broadest aspect—that which best promotes the interest of Williams, Deacon & Co.—the Danner Land and Lumber Company paid, and the Bank of Mobile received payment of said bills, in their joint wrong, when the money was due and payable to Williams, Deacon & Co. If this be the true state of the case, then the Land and Lumber Company is not discharged by such payment from the obligation to pay, unless Williams, Deacon & Co. ratify the bank's unauthorized collection. Ratifying it, however, Williams, Deacon & Co. would be held to have discharged the Land and Lumber Company as their debtor, and to have agreed to look alone to the Bank of Mobile for payment. Considered on this hypothesis, what right or claim have the complainants against the Bank of Mobile, and against the property received in payment from the Land and Lumber Company? Was the property received by the bank charged with a trust? If the payment to the Bank of Mobile had been made in money, then, if ratified, there would have been created only a debt or duty resting on the bank to pay to Williams, Deacon & Co., with no trust or lien on anything to secure its payment, for money has no earmark. The payment, however, was made in property, which remained in specie, so far as we are informed, when the bank assigned to Jones. It is still undisposed of and unconverted, so far as we know. To the extent this property represents the debt evidenced by said fifteen bills of exchange, if the facts are correctly set forth in the cross-bill, the Bank of Mobile is out nothing. True, it parted with its cash when the bills were discounted, but it received it back, when Williams, Deacon & Co. accepted and paid the bank's drafts, drawn on the credit the remitted bills furnished. On the averments of the cross-bill, Williams, Deacon & Co., by ratifying the said collection by the bank from the Land and Lumber Company, would become entitled, *ex aquo et bono*, to so much of the proceeds of the property received by the bank from the Land and Lumber Company, as was in payment of said fifteen bills of exchange. The bank was not entitled to such proportionate proceeds, for it paid nothing for them. If, then, the bank assumed to collect these bills of exchange without authority, and received payment in property, promising, in consideration thereof, to pay the bills, thus relieving the Land and Lumber Company from all liability to pay said bills; and if the bank, becoming insolvent, fails to pay said bills, and thus leaves the debt resting on the Land and Lumber Company, is there any reason why the said Land and Lumber Company can not hold the bank, and its assignee, trustees of the property thus failed to be applied, and compel them to account for the proportion of the property, which was turned over in payment of the debt

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evidenced by the bills of exchange? And is not this on the theory, that by the insolvency of the bank, Williams, Deacon & Co., or the Land and Lumber Company, as the case may be, is armed with the option of having the property declared trust property, and applied to the purpose for which it was turned over; or, if renounced by the beneficiary, of having it restored to the grantor?

All that is said on the point last discussed, must be considered as resting on the hypothesis, that Williams, Deacon & Co. paid the advance drafts of the Bank of Mobile, on the faith and credit inspired by the possession of said bills of exchange accepted by Shadholdt & Son. There need have been no express agreement to this effect. It is enough, if it was in accordance with their usual course of dealings. Of course, if the advance was simply a loan, entirely uninfluenced by the Shalboldt acceptances, then Williams, Deacon & Co. are simple creditors of the insolvent bank, without lien or security, and without any recourse against the Danner Land and Lumber Company, or against the property paid by it to the bank.

We have shown that, in one category, the complainants in the cross-bill have no interest whatever in the fund they are seeking to subject. That category is, that the advance was made as an independent loan, in no manner connected with, or dependent on the Shadboldt acceptances. A second category is that set forth in the cross-bill—that the advance was made on the faith of the Shadboldt acceptances, and relying on their collection for reimbursement. This, we have intimated, would secure to Williams, Deacon & Co. a lien on those bills and their proceeds, paramount to all right of control and direction the Bank of Mobile might attempt to assert. We have further intimated, if this be the true state of the case, that the Bank of Mobile had no right to receive payment of the bills; but having done so, it rested with Williams, Deacon & Co. whether they would ratify such collection, and claim their proportionate share of the property. We have said that, in the event of ratification by Williams, Deacon & Co., neither they, nor any one else, has any longer any claim against the Land and Lumber Company based on said bills, for they would thereby have become paid. This rests on very simple principles. Ratification of an unauthorized act must be entire. It can not be partial, accepting the good, and rejecting the unacceptable. No one will be permitted to claim rights as conferred by a grant, conveyance, or other contract, without adopting the whole contract, and surrendering any and all seeming rights which the instrument appoints to another. A claim can not be asserted under, and as conferred by an instrument or contract, in connection with another which antagonizes the instru-

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ment or contract, or any of its conferred rights.—Wharton on Agency, § 72; Perry on Trusts, § 596; *Harrison v. Gardner*, 10 Ala. 185; *McReynolds v. Jones*, 30 Ala. 101; *Hatchett v. Blanton*, 72 Ala. 423.

The cross-bill in this case sets forth, in unmistakable terms, that Williams, Deacon & Co. renounce and repudiate the alleged settlement and payment of the bills by the Land and Lumber Company to the Bank of Mobile, and that they have instituted suits against Shadboldt & Son as acceptors, and the Land and Lumber Company as drawers of said bills. Those suits, it is averred, were pending when the cross-bill was filed. The bills had been previously protested for non-payment, and notice given to the drawer. Williams, Deacon & Co. have thus shown by their own averments that they repudiate the alleged payment, and seek redress on the bills, as living evidences of debt. This is incompatible with the relief they seek by their cross bill, and the chancellor did not err in sustaining the demurrer to it. It should be stated that this rule of election would not probably apply, if the Land and Lumber Company had merely conveyed the property as security for the liability. The conveyance was absolute in form, and was made and accepted as payment, not as security.

We have not considered whether appeal is the proper mode of bringing the chancellor's interlocutory ruling on the cross-bill before us. Nor have we considered, in the event appeal will not lie, whether appellants could obtain redress by *mandamus*, if they had shown a right to the relief claimed in their cross-bill. They have failed to show themselves entitled to the relief they pray, and we need not consider whether, in the present stage of the litigation, they are entitled to any, and, if any, to what form of redress.

Affirmed.

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Bill in Equity to enforce Verbal Agreement as Mortgage, or Equitable Lien on Personal Property.

1. *Waiver of exemptions in personal property.*—A verbal mortgage of personal property can not operate as a valid waiver of the right to claim the property as exempt Code, §§ 2846, 2848; and a written instrument is not effectual for that purpose, unless the intention to make such waiver is therein clearly expressed.

2. *Equitable mortgage; writing held insufficient.*—A letter addressed

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to a merchant, in these words: "*I am always the man to do right. If you think it proper to put the guano in the paper that Mr. H. has against me and my boys, it will be all right with me,*" is not so free from ambiguity as to authorize the court to construe it as a verbal mortgage for the price of the guano, operating *in presenti*.

APPEAL from the Chancery Court of Pike.

Heard before the Hon. N. S. GRAHAM.

The bill in this case was filed on the 20th February, 1884, by John B. Knox, against Archelaus Wilson and his two sons, Charles and Wm. H. Wilson; and sought to establish and enforce an alleged equitable lien or mortgage on certain crops raised by the defendants, for the price of a certain quantity of guano, sold and delivered to them by the plaintiff, amounting to \$282.75. According to the allegations of the bill, the plaintiff sold and delivered to the defendants, in the early part of the year 1882, a certain quantity of guano, to be used on land which they were jointly cultivating, under a verbal agreement with them that the price should be considered as included in a mortgage for advances which they had executed to one Henderson; and the money was paid to him, under this arrangement, out of the crops which they had conveyed to said Henderson by the mortgage. At the beginning of the next year (1883), "a similar arrangement was made for guano for the year 1883;" and the defendants having executed a mortgage to the Farmers' & Merchants' Bank at Troy, of which said Henderson was the president and principal stockholder, for advances made and to be made to them during the year 1883, conveying the crops raised by them jointly during that year, it was verbally agreed between them and the complainant "that said mortgage should stand also as a security for the guano," and the guano was afterwards delivered under this agreement. "Said A. Wilson not being present when this second arrangement was made, and in order that said agreement might not rest entirely in parol, complainant prepared an instrument in writing substantially embodying said verbal agreement, and sent it to said A. Wilson for his signature and that of his sons; but he returned the paper unsigned," and sent with it a letter addressed to the complainant, dated the 24th January, 1883, in these words: "*I am always the man to do right. If you think it proper to put the guano in the paper that Mr. Henderson has against me and my boys, it will be all right with me,*" to which said A. Wilson signed his name. The written instrument referred to was never signed by any of the defendants, but the guano was delivered from time to time, as the bill alleged, on their repeated promises to sign it, and on the faith of their verbal agreement that the debt should be considered as covered by the mortgage. The bill alleged, also,

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that the mortgage debt had been paid in full, that the defendants were insolvent, and that they were disposing of the residue of the crops remaining in their hands; and prayed that a lien on the property might be declared in favor of the complainant, for the amount of his debt, with interest, and that the property be sold for its satisfaction.

A joint and several answer was filed by the defendants, admitting the alleged agreement under which the guano was furnished during the year 1882, but denying that any similar agreement was made for the next year; admitting that said A. Wilson wrote and sent the letter above copied, but alleging that this was after a portion of the guano had been delivered, that the other defendants never assented to it, and that the proposed arrangement was never carried out. After filing this answer, A. Wilson made and filed his schedule and claim of exemption, claiming all the crops on hand; and this was set up in an amended answer.

On final hearing, on pleadings and proof, the chancellor dismissed the bill; and his decree is now assigned as error.

GARDNER & WILEY, for the appellant.

WM. H. PARKS, *contra*.

SOMERVILLE, J.—We cannot clearly see that the decree of the chancellor is wrong, in holding that the evidence fails to satisfactorily show that two of the defendants, William and Charles Wilson, ever agreed to make a parol mortgage of their property to secure the debt admitted to be due the complainant. So far as concerns the other defendant, A. Wilson, the evidence probably shows that he expressed a willingness to give such a mortgage, both verbally and in writing; but his intention seems to have remained unexecuted. His note to the complainant, bearing date January, 24th, 1883, is not sufficiently free from ambiguity to authorize us to construe it to be an equitable mortgage, operating as such *in presenti*. The effort is to foreclose this alleged equitable lien on certain property, which is claimed by A. Wilson to be exempt from all legal process. The right of exemption, even to personal property, in this State, can be waived only by an instrument in writing. A verbal mortgage can not be operative as such a waiver. Const. 1875, Art. X, sec. 7; Code, 1876, § 2846. It is provided by statute, as well as by our constitution, that all exemption waivers must be included in written instruments, and the statute further declares that “the intention to make such waiver must be clearly expressed.”—Code, 1876, § 2848.

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The property, which is sought to be subjected, being shown to be exempt, and being claimed in the manner provided by statute, the bill was wanting in equity, and was properly dismissed.

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Bill in Equity for Specific Performance of Contract for Purchase of Land.

1. *Description of land, in agreement to sell and convey ; parol evidence in aid of.*—As held in this case on the former appeal (75 Ala. 475), an agreement to sell and convey a parcel of land, part of a larger tract, described in the written agreement as “sixty acres Comida and cane-bottom, also ten acres hill-side woodland adjoining the Mitchell tract,” is, on its face, void for uncertainty ; but parol evidence may be received to aid the uncertain description, and to identify the particular land intended to be sold, which was pointed out at the time, and of which the purchaser was put in possession.

2. *Same ; sufficiency of extraneous evidence identifying land sold.*—The particular lands intended to be sold being described in the amended bill with sufficient certainty, and the plat and survey made by the county surveyor, at the instance of the purchaser, corresponding substantially with this description, and its correctness not being impeached by any contradictory evidence ; this is sufficient to sustain the chancellor’s decree granting a specific performance, although the lands were pointed out to the surveyor by the complainant himself, and the survey was made without notice to the defendants.

3. *Re-examination of witness ; what is revisable.*—It is irregular to re-examine a witness without an order of court, the granting of which is matter of discretion with the chancellor ; and if a deposition is thus taken without authority of an order, it is discretionary with the chancellor whether he will suppress the deposition or not ; and the exercise of this discretion, in either case, is not revisable on error or appeal.

APPEAL from the Chancery Court of Dallas.

Heard before the Hon. N. S. GRAHAM.

WHITE & WHITE, for appellants.

SUMTER LEA, *contra*.

CLOPTON, J.—At a sale of the real estate of Alanson Saltmarsh, made by his administrator in December, 1877, the complainant purchased a tract of land, consisting of about eight hundred and forty acres. A few days afterwards, by agreement, the complainant transferred to Rainey and Lovett his bid and purchase, on their assuming his obligation for the pur-

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chase-money ; and they, in consideration, agreed in writing to give complainant "sixty acres of land, viz., fifty Comida and cane-bottom, also ten acres hill-side woodland joining the Mitchell tract." The particular sixty acres given to complainant was pointed out and designated, and he was put in possession, and continued in possession until about 1881, when he was forcibly dispossessed by Meyer Bros., to whom the land had been conveyed by Rainey, and who refused to recognize as binding on them the agreement with Rainey and Lovett. The bill is brought to compel specific performance of the agreement.

When the case was before us on a former appeal (75 Ala. 475), we held, that the agreement, unaided by other and extraneous evidence identifying the subject-matter, is void for uncertainty ; but that it was competent to show, by parol evidence, the particular land pointed out and designated, in pursuance of the terms of the agreement, and that complainant was put in possession thereof ; and when the contract is thus aided, the defect of uncertainty is cured. We also substantially held, that if the bill were amended, so as to set forth a correct and certain description of the land, the complainant, on satisfactory proof of the agreement, and of identification, would be entitled to a specific performance. The superadded description of the land in the original bill did not obviate the objection of uncertainty, and there was a variance between the allegations and proof in respect to the description. The cause was therefore remanded, that the complainant might, by an amendment, obviate the variance. After the remandment of the cause, the bill was amended, so as to allege a certain and specific description of the land.

On the former appeal, we found that complainant had done what was tantamount to the payment of the consideration price, and that Meyer Bros. had notice, before their purchase of the lands, of the claim of complainant ; and the execution of the agreement is proved. The equities of the parties having been settled, and the bill having been properly amended, the only remaining question on the merits is, whether the proof sufficiently identifies the land, as described in the amended bill, with the subject-matter of the contract.

Before the bill was amended, the complainant procured the county surveyor to survey the lands, but without notice to the defendants. The description of the land in the amendment to the bill corresponds with the description and boundaries as ascertained and testified to by the surveyor. The correctness of the survey is not impeached, and there is no reason to question it, if the correct lands were pointed out to him. It is insisted, however, that the correct lands were not pointed out.

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A witness, the brother of the complainant, who was present, testified, that the lands surveyed are the lands embraced in this suit. While this witness may not have known the exact boundaries, he knew the location and situation of the lands, for he had cultivated it for three years as the tenant of the complainant. The complainant pointed out the lands to the surveyor. In his second deposition, he states the general boundaries as surveyed, and appends a plat of the fifty acres. These, though more specific, correspond substantially with the general description of the land which he was to have, as given in his first deposition. The agreement specified fifty acres "Comida and cane-bottom, and ten acres hill-side woodland." The Comida and cane-bottom was known, and also the hill-side woodland. The surveyor surveyed so as to include the bottom, and finding that if he commenced at the gate, which was designated to complainant by Rainey as the starting point, it would take in more than fifty acres, he cut off six or seven acres adjoining the land of Meyer Bros. Of this, they can not complain. The survey appears also to be consistent with the description given by Rainey of the land that complainant was to have. If the correct lands are not surveyed, it was in the power of the defendants to have shown it. They prefer, however, to rely on the inability of complainant to make sufficient proof. While the evidence might have been more explicit in some respects, it does not clearly appear that the chancellor is wrong in his finding of the facts.

It is irregular, after a witness has been examined, to re-examine him without an order of court. Granting such order is discretionary with the chancellor. If a witness is thus re-examined; the suppression of the deposition is in the discretion of the chancellor, and the manner in which he may exercise that discretion is not revisable.

Affirmed.

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Bill in Equity by Creditors of Insolvent Bank, for Removal of Assignee, Appointment of Receiver, and Administration of Trust by Court.

1. *Pleadings construed against pleader.*—Pleadings must be reasonably certain, and when assailed by demurrer, if susceptible of more than one construction, that construction must be adopted which is least favorable to the pleader.

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2. *Requiring bond of assignee, or trustee.*—A trustee, or assignee, in a deed of assignment for the benefit of creditors, though relieved from giving bond by the instrument itself, may be required to give bond by the beneficiaries of the deed (Code, § 3735); and when it appears that he has offered to give bond, and has done so under the order of the court, the fact that the assignment did not require a bond is no reason for removing him, at the instance of the creditors, and appointing a receiver of the property in his stead.

3. *Trusts for creditors; when equity will assume jurisdiction, at instance of beneficiaries.*—Courts of equity have original jurisdiction of trusts, and will enforce their execution at the instance of the beneficiaries; but, when a general assignment is made by an insolvent bank, for the benefit of its creditors, a court of equity will not at once assume jurisdiction, at the instance of some of the creditors, remove the assignee, and appoint a trustee or receiver in his stead, unless it is shown that the assignee is incompetent or unfit for his office, or that he has been guilty of some neglect or breach of duty.

4. *Same.*—That the assignee is a young man, and has had but little business experience; that his property is inconsiderable when compared with the value of the property conveyed by the assignment, while he was not required to give bond; that he was a director of the bank at the time the assignment was made, and also during the period of the mismanagement of its affairs, which resulted in its insolvency, through excessive loans to its president against bitter opposition in the board of directors—these facts, as alleged, are not sufficient to justify his removal, at the instance of creditors, and the appointment of a receiver in his stead, when it does not appear that he participated in the alleged mismanagement, or voted with the majority in favor of the excessive loans to the president; and when it does appear that he has already offered to give, and has given bond for the faithful performance of his duties.

5. *Remandment on reversal, for amendment.*—When the chancellor overrules a demurrer to a bill, and this court, on appeal, reverses his judgment, a final decree will not be here rendered, but the cause will be remanded, in order that the complainant may have an opportunity to amend his bill, if he desires to do so.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 9th July, 1884, by James McPhillips and others, depositors and creditors of the Bank of Mobile, against the said bank, its board of directors as individuals, and Winston Jones, as trustee or assignee in an assignment which said bank had executed to him for the benefit of its creditors; and asked the court to assume jurisdiction of the trust created by the assignment, to remove the assignee, and to appoint a receiver as trustee in his stead. The material allegations of the bill are stated in the opinion of the court. By amendment, the names of the directors as defendants were struck out. Demurrers to the bill were filed by the bank, and by the assignee, each assigning numerous causes of demurrer. The cause being submitted to the chancellor on the demurrers, and also on motion to appoint a receiver, he rendered a decree assuming jurisdiction of the trust, but overruled the demurrers, and refused to appoint a receiver. The assignee appeals from this decree, and here assigns it as error.

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GAYLORD B. CLARK & F. B. CLARK, Jr., for the appellant, and with them HAMILTONS, representing certain creditors and depositors.—General assignments, in trust for creditors, are approved in equity, as meritorious.—2 Perry on Trusts, § 585; Bump on Fraud. Conv. §§ 384-5. The assignor has a right to select the trustee, and the latter has a reasonable time within which to act.—Burr. on Assignments, §§ 91, 492; Bump Fraud. Conv. 366. The appointment of a creditor, or a joint debtor, or a relative, or the president of the corporation which makes the assignment, is not objectionable, as showing danger to the trust.—*Pope v. Brandon*, 2 Stew. 401; Bump Fraud. Conv. 366; 2 Perry on Trusts, § 558; Burr. Assignments, § 91. The trustee himself may at any time come into equity, asking the instructions or protection of the court in the discharge of his duties; but, to authorize its interference at the instance of creditors, or other beneficiaries, they must show some unfitness, neglect, delay, or maladministration on the part of the trustee, or some danger to the trust estate.—1 Perry on Trusts, §§ 275-7; 2 *Ib.* §§ 816-19; High on Receivers, §§ 411-12; *Berry v. Williamson*, 11 B. Monroe, 245, 271; *Micou v. Moses Brothers*, 72 Ala. 439; Field's Lawyer's Briefs, § 331. In this case, the bill was filed when the ink was scarcely dry on the deed of assignment; and no neglect, nor act of misconduct, is charged against the trustee. His removal is sought, under general charges of unfitness, which, when analyzed, resolve themselves into these: that he is a young man, and has had but little experience; that he is poor, and that he was a director of the bank during the mismanagement which culminated in its insolvency. But it is not alleged that he is in any way responsible for such mismanagement, nor that he did not in fact oppose it; and a director is not personally responsible for an error in judgment, from which loss ensues.—*Godbold v. Br. Bank*, 11 Ala. 191; *Sterling's appeal*, 71 Penn. St. 11; *Arthur v. Griswold*, 55 N. Y. 400; *Turquand v. Marshall*, L. R., 4 Ch. 386. Though the deed required no bond of the assignee, creditors may require him to give one (Code, § 3735), and the record shows that he has in fact given one. It has been held that not even insolvency is a sufficient objection to an assignee, character being esteemed as solvency.—2 Perry on Trusts, § 819; Bump. Fr. Conv. 377. As to the age of the assignee, the law has prescribed no particular age as a qualification for the office; and as to the experience necessary for the "discharge of the duties of so great and complicated a trust" as this is alleged to be, that is necessarily a mere matter of opinion, and can not be gauged by any legal test.

HANNIS TAYLOR, *contra*.—"As soon as an assignee accepts a
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general assignment for the payment of debts to creditors, either directly or by implication, he becomes a trustee for them; and as soon as they have notice, they may compel the execution of the trust in a court of equity."—2 Perry on Trusts, § 594, citing the following cases: *Moses v. Murgatroyd*, 1 Johns. Ch. 119; *Shepherd v. McEvers*, 4 Johns. Ch. 136; *Pingree v. Comstock*, 18 Pick. 46; *Wier v. Tannehill*, 2 Yerger, 57; *Nicoll v. Munford*, 4 Johns. Ch. 523; *Ward v. Lewis*, 4 Pick. 518; *New Eng. Bank v. Lewis*, 8 Pick. 113; *Robertson v. Sublett*, 6 Humph. 313; *Pearson v. Rockhill*, 4 B. Monroe, 296; *Kelly v. Babcock*, 49 N. Y. 320; *Hulse v. Wright*, Wright (Ohio), 61. This principle is recognized in several decisions of this court.—*Sledge v. Clopton*, 6 Ala. 598; *Eldridge v. Turner*, 11 Ala. 1049; *Andrews v. Hobson*, 23 Ala. 232. The equity of the bill not only rests on this general principle, but special grounds for the interference of the court are shown. The trust is complicated, and the property worth nearly half a million of dollars; its administration is committed by the deed to a young man, who has had little (if any) experience in such matters, and who is alleged to be incompetent; no bond is required of him, and his own estate is inconsiderable, when compared with the value of the property intrusted to his charge; and he is charged with participation in the mismanagement of the affairs of the bank which has brought about its insolvency. These special circumstances present cogent reasons for the interference of the court, and they are all admitted by the demurrer.

(On application for a modification of the decree first rendered.) The appeal is taken from the decree overruling the demurrers, and, of course, the complainants had no opportunity to amend their bill. On a reversal of that decree, this court will remand the cause, in order that the complainants may, if they desire, remedy the defects of their bill by amendment. *Kingsbury v. Milner*, 69 Ala. 505; *Bishop v. Wood*, 59 Ala. 253; *Little v. Snedcor*, 52 Ala. 167; *Rose v. Gibson*, 71 Ala. 42; *Massey v. Modawell*, 73 Ala. 421; *Yonge v. Hooper*, 73 Ala. 121.

STONE, C. J.—On the 8th day of July, 1884, the Bank of Mobile, pursuant to a voted order of its board of directors, made a general assignment to Winston Jones, assignee, conveying all its property for the benefit of all its creditors, giving no preferences except as the law secures. Jones was one of the directors of the bank. He had been selected as trustee by the board of directors, and he accepted the trust. The assets assigned are estimated at four or five hundred thousand dollars; the liabilities much larger. The depositors who receive no interest on their

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deposits—a preferred class—will probably exhaust the entire assets, and fall short of realizing their entire demands, leaving nothing for general creditors and share-holders.

On the 9th day of July, 1884, James McPhillips, and other creditors of said bank, representing claims in amount between ten and fifteen thousand dollars for deposits made in the bank, filed the bill in this case, in favor of themselves and all other creditors who would come in and make themselves parties according to the rule in such cases, and prayed—first, that the control and administration of said trust be transferred to the Chancery Court; and, second, that a receiver be appointed to execute the trust, instead of Winston Jones, the assignee named in the assignment. The bill was sworn to, and the material averments relating to the relief prayed are in substance as follows: That the president of the bank, Danner, was indebted to the bank before he became its president, and “that for this reason, and for the further reason that the said Danner was engaged in a large and hazardous business, which compelled him to borrow large sums of money, there was serious opposition on the part of some of the directors to his election to the presidency of said bank. Your orators further aver, upon information and belief, that after the said Danner was so elected president, he continued to borrow money from said bank, for use in his hazardous business, until the total sum borrowed by him reached the enormous sum of one hundred and sixty thousand dollars, or thereabouts,—a sum in excess of the real capital of the bank. Your orators further aver, that all this mismanagement of the affairs of the bank was done with the full knowledge and assent of the said board of directors, . . . and that such mismanagement was in violation of the trust imposed upon them as such directors. . . . Your orators aver that, on the day on which said failure occurred (July 8th, 1884), the said board of directors made a general assignment of all the bank’s assets and property of every kind to Winston Jones, in which is given him almost unlimited power to do almost every act which said corporation itself could do, in winding up its affairs.” The bill, after averring that the property thus assigned “amounts to several hundred thousand dollars” in value, proceeds as follows: “That the said assignee who is endowed with this great trust, and with these ample powers, was one of the board of directors of said bank, through whose mismanagement the trouble and failure of said bank was brought about, and he is now a director of said bank; that said assignee is a very young man, with little or no experience, or fitness to discharge such a great and complicated trust as that imposed upon him in this case, and that he can not, in the opinion of complainants, discharge it efficiently, to the best interest of all con-

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cerned ; that said assignee has been put in unlimited control of hundreds of thousands of dollars in property and money, without any security whatever, and the individual property owned by him bears no considerable relation to the value of the property intrusted to him ; that there has been for a long time a serious and bitter feud in the directory of said bank, to which the said assignee has been a party ; that the said trust is, from its very nature and terms, one which can not be effectively managed and discharged, and dividends duly declared, except under the jurisdiction and direction of a court of equity."

We have now stated every material averment of the bill, which is relied on as furnishing grounds for transferring the administration of the trust to the Chancery Court, and for placing it in the hands of a receiver. It is not shown when Danner was chosen president of the bank, nor is it averred whether or not Jones favored his election. It is not averred that Jones, as a director, favored the excessive loan to Danner, the president ; nor that he was one of the directors who favored or contributed to the mismanagement which ruined the bank. Governing bodies, such as boards of directors, are presumed to be controlled by majorities ; and it being averred that there was a feud among the members of the board, we are furnished with no means of determining whether he was with the controlling majority, or with the dissenting minority. Pleadings must be reasonably certain, and, when susceptible of more constructions than one, that must be adopted which is least favorable to the pleader. There is not enough averred in the bill, tested by the rules above, to justify us in finding, on the admissions implied from the demurrer, that Jones favored Danner's election, or that he was even a director at that time ; nor are we justified in finding that he favored the excessive loan to Danner, or that he is personally responsible for any part of the alleged mismanagement which ruined the bank.

The chancellor refused to appoint a receiver, but overruled the demurrer to the bill—decreeing that the trust should be administered in the Chancery Court. From that decretal order the demurrants prosecute the present appeal.

One special ground urged for equitable interference is, that the assignee has given no bond. In relation to this, our statute (Code of 1876, § 3735) makes provision for requiring bonds from trustees, such as Jones is in the present case. On petition of complainants, Jones has been required to give, and has given bond. It is, perhaps, due to him that we should say, he appears to have made the offer, in his answer, to give bond. This was before any motion was made requiring him to do so.

The equity of the bill is attempted to be maintained on the broad principle, that there is a trust, in which the complainants

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are beneficiaries, and that equity will take charge of, and direct its administration, because trust is one of the original grounds of equity jurisdiction. In *Perry on Trusts*, § 594, it is said : "As soon as an assignee accepts a general assignment for the payment of debts to creditors, either direct or by implication, he becomes a trustee for them ; and as soon as they have notice, they may compel the execution of the trust in a court of equity." The argument based on this language is, that the beneficiaries under such assignment, just so soon as they have notice that such trust has been accepted by the assignee, may demand, as matter of right, that the trust shall be administered in the Chancery Court. If a correct interpretation of the author's language make it mean what is claimed, he stands almost, if not quite alone, in the assertion of such principle. It is very true, that equity compels the execution of trusts, and, when it asserts its compulsory power, it does so in the Chancery Court. It is there alone it has power to act. But, the mere existence of a right, without more, does not put the machinery of the law in operation. There must be a right, and a failure or refusal of the party on whom the duty of payment or performance rests, to pay the debt, or to discharge the duty. A mere debt, unless there is a breach of the contract by a failure to pay according to its terms, gives no right of action. Chancery compels the specific performance of contracts, but only after there has been a failure to perform, and, in most cases, a refusal, on the part of the obligor. Equity sometimes raises and enforces trusts, but it is only when rights have been wrongfully withheld from parties complaining. The law, in its active forms, redresses grievances, and enforces rights which can not otherwise be reduced to actual enjoyment. It gives no encouragement to a needless resort to its coercive processes. It has no condemnation for the citizen who is peaceably doing his duty, and wronging no one.

We can not think, however, that Mr. Perry intended to be understood in the sense above considered. The authorities he cites give no sanction to such doctrine. In *Moses v. Murgatroyd*, 1 Johns. Ch. 119, the trust funds were being misapplied to purposes other than those for which the trust was created, and chancery restrained the abuse. *Gray v. Thompson*, *Ib.* 82, presented the case of a trustee, who neglected for many years to distribute the trust funds among the creditors ; chancery compelled him to make distribution, and to pay interest on the money, thus improperly withheld. *Shepherd v. McEvers*, 4 Johns. Ch. 136, was a case of misappropriation of the trust fund by the trustee, not distinguishable in principle from *Moses v. Murgatroyd*. *Pingree v. Comstock*, 18 Pick. 46, was a case of misuse of the trust funds by some of the

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creditors, and neglect of duty by the assignee. *Weir v. Tannehill*, 2 Yerger, 57, presented the case of a refusal by the trustee to distribute to the creditors the proportion to which they were entitled. *Nicoll v. Munford*, 4 Johns. Ch. 522, rests for its equity on the facts, that the property in controversy was held in joint ownership between two; that one party had sold and conveyed his interest, and the other had unlawfully appropriated such interest to the liquidation of an alleged balance due him. *Ward v. Lewis*, 4 Pick. 518, was the case of a trustee attempting to deny the trust, after having once accepted it. *New England Bank v. Lewis*, 8 Pick. 113, arose out of a refusal by the assignee to pay preferred creditors, and the exhaustion of the fund in the payment of non-preferred claims. *Robertson v. Sublett*, 6 Humph. 313, is similar to *Gray v. Thompson*, *supra*. The case of *Pearson v. Rockhill*, 4 B. Monroe, 296, was an attack, by non-preferred creditors, on a deed of trust or assignment, seeking to set it aside as fraudulent. *Kelly v. Babcock*, 49 N. Y. 318, was a suit at law for money had and received, in which it was attempted to show that defendant had received money, which, *ex aequo et bono*, should be paid to the plaintiff. We repeat, none of these authorities furnish any support to the interpretation claimed of Mr. Perry's language. We must suppose his meaning was, that the faithful execution and settlement of trusts proper could only be enforced in a court of equity; and whenever rendered necessary, whether by the ignorance, willfulness, or bad faith of the trustee, the court, on proper application, will take jurisdiction, and see that the trust is executed in its true spirit. Thus interpreted, our own rulings harmonize with it. *Benagh v. Turrentine*, 60 Ala. 557; *Clark v. Eubank*, 65 Ala. 245; *Moore v. Randolph*, 70 Ala. 575; *Clark v. Knorr*, *Id.* 607; *Clark v. Hughes*, 71 Ala. 163; *Royall v. McKenzie*, 25 Ala. 363.

In 1 Field's Lawyer's Briefs, § 331, is a correct statement of the principle, in the following language: "In case of a neglect, unreasonable delay, or failure of the assignee to execute the trust created by an assignment, or to account or make distribution, or in case of a wrongful distribution of the proceeds, any creditor interested in the assignment may, in the absence of statutory regulations on the subject, on general principles applicable to such cases, proceed against the assignee in equity, and compel him to execute the trust and perform his duty in the premises." The following authorities, cited by the author, support this statement of the principle.—*Congregational Society v. Trustees*, 23 Pick. 148; *Fitch v. Workman*, 9 Mete. 517; *McCrea v. Purmort*, 16 Wend. 460; *N. Y. Ins. Co. v. Roulet*, 24 Wend. 505; *Keyes v. Buist*, 2 Paige,

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311: *Wright v. Henderson*, 7 How. Miss. 539. We hold that the bill, in this aspect of its asserted equity, can not be maintained.

The question before us must be determined on the special grounds averred in the bill. We have disposed of some of the grounds urged for the relief prayed—namely, that Jones, the assignee, was one of the directors of the bank when the large credit was extended to Danner, and when there was other mismanagement, which collectively led to the bank's failure, and had given no bond. The other averred grounds are, that Jones is a very young man, has little or no experience or fitness to discharge such a great and complicated trust, and that his individual property bears no considerable relation to the value of the trust property. These are very general, if not indefinite averments. They intimate no apprehension of dishonesty, or bad faith. The bill was sworn to, and, considering it and the affidavits offered *pro* and *con*, the chancellor declined to appoint a receiver. If this order of the chancellor was before us for review, we would not feel inclined to disturb it. This ruling of the chancellor convinces us that, in making the decretal order, taking jurisdiction of the administration of the trust, he was influenced, not by the special grounds averred in the bill; but that he founded his ruling on the naked ground, that equity has jurisdiction of the administration of trust estates. We have shown that in thus holding he erred.

Recurring to the special grounds, we consider them insufficient. It should require a strong case—much stronger than is here shown—to justify the court in interfering with the trustee's administration of a trust, at the very threshold of his duties.—*Middleton v. Dodswell*, 13 Ves. 266; *Poythress v. Poythress*, 16 Ga. 406; *Barkley v. Lord Reay*, 2 Hare, 306; *Ogden v. Kip*, 6 Johns. Ch. 160; *Browell v. Reed*, 1 Hare, 434; *Hathornthwaite v. Russell*, 2 Atk. 126; *Anon.*, 12 Ves. 4. Dishonesty, faithlessness, fraud, incompetency, or inefficiency, sufficiently averred in its constituent facts, would justify the displacement of the trustee or assignee, and the transfer of the trust to the Chancery Court. Without a cause shown sufficient to remove or displace the trustee or assignee named in the assignment, a bill, filed as this was, is without equity, unless it sets forth, with proper averments of facts, some special equitable ground, why the trustee shall not proceed without instructions from the Chancery Court, and shows, further, that the trustee persists in the execution of the trust, without invoking such instructions. There are many cases of questionable interpretation, in which it is both the privilege and duty of the assignee to obtain the court's instructions. Refusing to do so, and assuming to act on his own unaided

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judgment, we will not say a beneficiary, who shows himself injured by the erroneous judgment of such assignee, may not himself, at any stage of the administration, invoke and obtain a decree of the Chancery Court, correcting such erroneous judgment of the assignee, and properly administering the trust. Of course, such bill by a dissatisfied beneficiary would be at the risk and peril of establishing and fastening error on the assignee, and should not be resorted to, except in cases of threatened injury, for which there is no other adequate means of redress, or prevention. It is not our purpose, however, to decide the question last discussed. We allude to it for the purpose of saying, that our judgment, pronouncing the present bill insufficient, is not intended to be understood as declaring that in no case can a beneficiary invoke the powers of a Chancery Court, while the trust is being administered. We leave this question open.

The demurrer to the bill in this cause should have been sustained; but the bond executed by the assignee is not vacated or impaired by this decree. It will remain of file as a security to the beneficiaries, that the assignee will faithfully administer the trust, and properly account for and pay over the proceeds.

On June 25th, 1885, we delivered an opinion reversing the decretal order of the chancellor rendered in this case, and decreed that the bill be dismissed. In rendering a final decree here, coming before us as this case did, we departed unwittingly from our uniform rule in such cases. We should have declared, that the chancellor erred in overruling defendant's demurrer, and remanded the cause, that the bill be dismissed in the court below, unless so amended as to cure the defects in the present bill. Decreed accordingly.—*Security Loan Assn. v. Lake*, 69 Ala. 456; *Rapier v. Gulf City Paper Co.*, *Ib.* 476; *Rose v. Gibson*, 71 Ala. 35; *Conner v. Smith*, 74 Ala. 115.

The costs of the appeal to be paid by the appellees.

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Application for Revocation of Letters of Administration.

1. *Revocation of letters of administration, as improvidently granted.* When letters of administration have been granted as in case of intestacy, and a will is afterwards produced and proved, the statute makes it mandatory on the court to revoke such letters on the application of the per-

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son named as executor (Code, § 2414); but, when such letters are granted on the representation of the person appointed that the decedent left no will, although the will had been already admitted to probate, and the estate administered under it for many years, the court may revoke them, on the application of any persons interested in the estate, or even *ex mero motu*, as having been irregularly and improvidently made.

APPEAL from the Probate Court of Barbour.

Heard before the Hon. A. H. ALSTON.

In the matter of the estate of Charles D. Bush, deceased, who died in said county, in the year 1853; on the application of Mrs. Salina B. Glover and others, heirs at law of said decedent, distributees of his estate, and legatees under his will, for the revocation of letters of administration *de bonis non*, as in case of intestacy, granted to John A. Watson on the 19th November, 1884. The record sets out the petition of said Watson asking the grant of letters of administration to himself, which was filed on said 19th November, 1884, and in which he alleged that said decedent died in said county, "leaving no last will and testament, so far as petitioner knows or believes," and leaving an estate consisting of real and personal property, of which about three hundred acres of land remained still unadministered; that letters of administration on said estate were granted by said court, on the 20th January, 1882, to one Martin, as sheriff of the county; that Martin's term of office expired on or about November 1st, 1884, and there was a consequent vacancy in the administration. The petition asking the revocation of these letters, which was filed on the 19th December, 1884, alleged and charged that the petitioners had no notice of said application; that said decedent did not die intestate, but, on the contrary, his last will and testament was duly proved and admitted to probate in said court many years before, and the estate was administered under its provisions by the former administrator; that these facts were well known to said Watson when he filed his application for the grant of letters; that he was not a proper person to be appointed administrator; that he had no interest in the estate, and no claim against it, but was interested adversely to it on account of some former litigation; and they therefore insisted that his letters, if not void, were irregular and voidable, and prayed that they might be revoked, and that letters of administration *de bonis non* with the will annexed might be granted to C. D. Bush, one of said petitioners.

An answer to this petition was filed by Watson, in which he admitted the probate of the decedent's will, and alleged that the averment of his intestacy, contained in his petition, was inserted therein by the mistake and inadvertence of his counsel; denied that he had any interest adverse to the estate, or was in

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any way disqualified as administrator; and demurred to the petition, on the ground that no cause for the revocation of his letters was shown. The court having overruled the demurrer, Watson then asked leave to amend his original petition, by striking out the averment that the decedent died intestate, and alleging, in lieu thereof, that he died testate, and that his will was duly proved and admitted to probate in said court; but the court refused to allow the amendment, and rendered a decree declaring the grant of letters to him "irregular, voidable, and revocable," and revoking and setting them aside. The decree recites that Watson excepted to the refusal of the court to allow the proposed amendment of his petition, but there is no bill of exceptions in the record.

The refusal of the court to allow this amendment, and the decree revoking the grant of administration, are now assigned as error.

McKLEROY & COMER, and H. D. CLAYTON, Jr., for the appellant.

J. N. WILLIAMS, and J. M. WHITE, *contra*.

SOMERVILLE, J.—The letters of administration issued to Watson were granted upon the representation, made by him, that the decedent died without leaving a will. This being untrue, the grant was voidable, and it was both the right and duty of the Probate Court to revoke such letters, as having been irregularly and improvidently granted.—*Broughton v. Bradley*, 34 Ala. 694; *Jennings v. Moses*, 38 Ala. 402.

The provisions of the Code, specifying certain causes for which an administrator may be removed, have no application to cases of this character, as several times heretofore adjudged by this court.—*Curtis v. Williams*, 33 Ala. 570; *Dunham v. Roberts*, 27 Ala. 701; Code, 1876, § 2386.

The power thus to revoke letters of administration, improvidently or irregularly issued, is one inherent in Probate Courts as a feature of their general jurisdiction, and may be exercised by them in proper cases, *ex mero motu*, without application being made for such purpose by any one.—1 Williams on Ex'rs (Perkins' Ed.), 643-644, note (o); *County Court v. Bissell*, 2 Jones, (Law) N. C. 387; *Curtis v. Williams*, 33 Ala. 570. Section 2414 of the present Code (1876) only regulates this jurisdiction, so far as to make it mandatory upon the Probate Court to revoke letters granted as in case of intestacy, where a will is proved, and the executor therein named appears and claims letters testamentary. Upon his compliance with the requisitions of the law, the court is required to grant to

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him letters testamentary. Our statutes no where abrogate this inherent power, nor limit its exercise to an application made by any particular person. The better practice, however, is to require an application in writing by the parties in interest who desire to invoke the jurisdiction in their behalf.

The letters granted Watson having been properly revoked, and all right of preference, conferred by the statute upon particular classes of persons, having been forfeited by lapse of time, the probate judge was invested with a large discretion in selecting a suitable person to succeed in the administration; and we can not see from the record that he has exercised it in such a manner as to violate any rule of law.

Judgment affirmed.

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Attachment by Landlord, for Advances to Tenant.

1. *Sufficiency of affidavit.*—An affidavit for an attachment, sued out by a landlord against his tenant, for advances to make a crop (Code, §§ 3467, 3469, 3472-3), is to be liberally construed, and is sufficient if it sets forth with substantial accuracy the general jurisdictional facts, either expressly, or by necessary implication; nor is it necessary to negative conclusions or inferences to the contrary.

2. *Same.*—When an attachment is sued out on 30th December, claiming an indebtedness for advances made to enable the defendant to make a crop on lands rented from the plaintiff, but not stating for what year, the necessary and reasonable implication is, that the advances were made during the year just expiring; and if in fact any part was made during the preceding year, a balance remaining unpaid at the end of the year, such balance becomes a part of the advances for the next year, while the tenancy continues, and may be recovered under such affidavit; but it is the better practice to state the particular facts as they are.

APPEAL from the City Court of Montgomery.

Tried before the Hon. THOS. M. ARRINGTON.

This action was brought by W. A. Gunter, against John W. DuBose, and was commenced by attachment, sued out on the 30th December, 1882. The affidavit for the attachment was made by the plaintiff himself, and stated, "that John W. DuBose is justly indebted to him, the said W. A. Gunter, in the sum of twelve hundred dollars, after allowing all just off-sets and discounts, for advances made by affiant to said DuBose, who was, at the time of making said advances, a tenant of land owned by said W. A. Gunter; that said advances were for moneys advanced by affiant to said DuBose, for the sustenance

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or well-being of said DuBose or his family, and for preparing the ground rented by said DuBose from affiant for cultivation, and for cultivating, sowing, handling and preparing the crop for market; and also for four mules advanced by affiant to said DuBose, to enable him to make a crop on said rented premises, which said mules were of the value of five hundred dollars; and at the time of obtaining all of said advances, the said DuBose was in the possession, as tenant of affiant, of that certain plantation in Montgomery county known as the 'Dr. Lucas plantation,' which was the property of said affiant, and which said DuBose was then, still is, and has all the time been holding, as the tenant of affiant; and that said DuBose has removed a part of the crop from said rented premises, without paying the amount due for said advances, and without the consent of his said landlord; and that this attachment is not sued out for the purpose of vexing or harassing the said defendant, or other improper motive."

The defendant pleaded in abatement of the attachment, on account of alleged defects in the affidavit, specifying the following as defects: 1st, because it fails to show that plaintiff's demand "is for advances made by plaintiff to defendant for the year 1882, or is for a balance due for advances so made for the previous year, to-wit, the year 1881;" 2d, it fails to show that plaintiff's demand "is within the terms of either section 3467 or 3469 of the Code of Alabama;" 3d, it fails to show "that plaintiff's demand arose after the statutes providing for landlord's liens for advances and rent were enacted;" 4th, it fails to show "that plaintiff's demand is not barred by the statute of limitations;" 5th, it fails to show "when plaintiff's alleged demand arose." A demurrer to this plea was interposed by the plaintiff, but was overruled by the court; and he then asked leave to amend the affidavit, by inserting an averment that the advances were made during the years 1880, 1881, and 1882; "which amendment the court refused to allow," as the bill of exceptions states, "and the *defendant* (?) excepted." Issue was then joined on the plea in abatement. On the trial, as the bill of exceptions shows, the plaintiff offered evidence showing that he had rented the said Lucas plantation to said defendant for each of the years 1881 and 1882, and made advances to enable said defendant to make a crop on said lands; and that a large balance remained due from the defendant, for and on account of the advances made during the year 1881. The court excluded this evidence, on motion of the defendant, and instructed the jury that they must find for the defendant; to which rulings and charge the plaintiff duly excepted.

The overruling of the demurrer to the plea in abatement, the refusal to allow an amendment of the affidavit as proposed,

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the exclusion of the evidence offered, and the charge to the jury, are now assigned as error.

R. M. WILLIAMSON, and L. A. SHAVER, for the appellant, cited *Cockburn v. Watkins*, 76 Ala. 486; *Fitzsimmons v. Howard*, 69 Ala. 592; Code, § 3315; Stephen's Pleading, 380.

BRAGG & THORINGTON, *contra*, cited *Evans v. English*, 61 Ala. 416; *Flexner & Lichstein v. Dickerson*, 65 Ala. 129; *DeBardelaben v. Crosby*, 53 Ala. 363.

CLOPTON, J.—The statute secures to the landlord a lien on the crop grown on rented land for rent for the current year, and for advances made in money or other thing of value, for the sustenance or well-being of the family, for preparing the ground for cultivation, or for cultivating, gathering, saving, handling, or preparing the crop for market; and also a lien on the articles advanced, and purchased with money advanced, or obtained by barter in exchange for any articles advanced, for the aggregate price or value of such articles or property.—Code, § 3467. The statute also gives the landlord process of attachment for the recovery of the sum due, when either one of the four grounds for attachment, specifically mentioned, exists; and provides, as preliminary and requisite to the issue of process of attachment, that affidavit be made of the existence of one of these grounds, and of the amount that is or will be due for rent and advances, or either rent or advances.—Code, §§ 3472, 3473.

The action was instituted by attachment, sued out by the plaintiff to recover an amount claimed to be due him as landlord, for advances made to the defendant as his tenant. There was a plea in abatement to the attachment, setting forth alleged defects in the affidavit, on which the process issued; to which plea the plaintiff demurred, and the demurrer was overruled. The defects in the affidavit, relied on in the argument of counsel, are, that the affidavit fails to state that the advances were made for the current year, or that the amount claimed is a balance due for advances for a previous year; and fails to show that plaintiff's demand arose after the statutes creating the lien were enacted.

In *Cockburn v. Watkins*, 76 Ala. 486, STONE, C. J., says: "The statute is conformed to, when the affidavit shows the relation of landlord and tenant existed; that advances for the purposes specified were made; that a balance, naming it, remains unpaid; and setting forth one of the statutory grounds for attachment in such cases. Of course, if there is a balance which laps over from year to year, in a case of continuing ten-

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aney, it would be better to state it, as was done in this case." In *Fitzsimmons v. Howard*, 69 Ala. 590, after stating substantially the same jurisdictional averments, which the affidavit must contain, it is said: "All the ingredients of the affidavit, except those above mentioned, are matters of form, and are amendable."

By section 3315 of Code, it is made our duty to liberally construe the attachment law, so as to advance its manifest intent. We can not add, by construction, to the statutory requisites, nor require greater certainty than is required by the statute. An affidavit is sufficient, which sets forth the general jurisdictional facts, either by express averments, or by necessary implication. If they are set forth with substantial accuracy, the affidavit need not negative conclusions, or inferences to the contrary. A substantial compliance with the terms of the statute is sufficient.

The affidavit sets forth, that the plaintiff is the landlord, and that the defendant is the tenant of the land mentioned, therein necessarily implying the relation of landlord and tenant as to the particular land; that the defendant is justly indebted to plaintiff in a specified amount, for advances of money for the specified statutory purposes, to enable him to make a crop on the rented premises; that the defendant was, at the time the advances were made, still is, and has all the time been, in possession of the rented premises as the tenant of plaintiff; and also the existence of one of the grounds for attachment in such cases. The affidavit might have been drawn with more accuracy, and greater certainty and definiteness; but, construing it liberally, and giving the averments their legal force and effect, the necessary and reasonable implication is, that the advances were made for the year 1882, the affidavit having been made December 30, 1882. It is a substantial compliance with the statute.

The proposed amendment was unnecessary. Section 3469 of Code provides: "Whenever the tenant fails to discharge his indebtedness for rent and advances, and continues his tenancy under the same landlord, the balance so due for rent and advances shall be held as so much advanced by the landlord towards making the crop of the succeeding year, for which a lien shall attach upon the crop, and continue upon the articles advanced." The effect of the statute is to make the balance due for advances of the preceding year a new advance, the same as an advance of money, or other thing of value, towards making the crop of the succeeding year. While it is the better practice to state the facts respecting the advances of the preceding year, and that a balance is undischarged and due, which laps over, an affidavit containing the jurisdictional averments,

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and including such balance in the aggregate amount specified as due for advances made towards making the crop of the succeeding year, is sufficient to cover and embrace such balance.

Whether the relation of landlord and tenant existed, or whether the articles advanced were within the general and specified terms of the statute, or whether the advances were made for the current year, are facts which may be put in issue in the attachment suit, and properly arise on the evidence.

Reversed and remanded.

Ex Parte Jones.

Application for Mandamus to Chancery Court, in matter of Petition under Bill by Assignee for Creditors of Insolvent Bank.

1. *Bill of exchange, not assignment of funds in hands of drawee.* When a bank draws a bill of exchange in favor of a depositor, on a person who has funds in hand to meet it, this does not, without more, amount to an assignment or appropriation of any particular funds, so as to vest the property therein in the payee as against a subsequent assignee of the bank for the benefit of creditors.

2. *Fraud of insolvent bank, drawing bill in favor of depositor; right of payee to rescind.*—When an insolvent bank draws a bill of exchange, in favor of a depositor, on a business correspondent with whom it has funds on deposit, and the bill is dishonored on presentation, because of an intervening assignment for the benefit of creditors made by the insolvent bank, the payee can not claim to rescind the contract, and be remitted to his original *status* as a depositor, when it is not shown that any intentional fraud or deception was practiced on him, nor that the bank had no reasonable expectation that the bill would be honored on presentment.

3. *Voluntary assignment by bank, drawer of bill; right of payee to rescind.*—When a party disables himself, by his own voluntary act, to comply with his contract, the other party may treat it as rescinded, and claim to be placed *in statu quo*, when the contract relates to property, which remains *in specie*, unaltered and undisposed of; but this principle can not be invoked by a depositor in an insolvent bank, because a bill of exchange, drawn in his favor by the bank, is dishonored in consequence of a subsequent assignment by the bank for the benefit of its creditors; no intentional fraud or deception being shown, and no want of funds by the drawee, when the bill was drawn.

The petitioners in this case, Mrs. Eliza A. Jones and Marcus Rosmanick, filed their respective petitions in the Chancery Court of Mobile, in a cause therein pending, wherein Winston Jones, as assignee and trustee for the benefit of the creditors of the Bank of Mobile, was complainant, and the said bank and its creditors were defendants; claiming to be creditors of said

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bank as depositors, and to have the right to share in the distribution of the assets in that capacity. The assignee demurred to the petitions, and the chancellor sustained his demurrer, and dismissed the petitions. The petitioners now apply to this court for a *mandamus*, to revise the action of the chancellor, and to compel the assignee to recognize them as depositors; and a transcript of the proceedings had on their petitions is made an exhibit to their application. The material facts are stated in the opinion of the court.

J. L. & G. L. SMITH, for the petitioners.—When the seller has been induced to part with his goods by the fraud of the purchaser, whether by misrepresentation or concealment of material facts, he may rescind the sale, and reclaim the goods. *Loeb & Brother v. Flash Brothers*, 65 Ala. 526; *Loeb & Brother v. Peters*, 63 Ala. 249; *Donaldson v. Farwell*, 3 Otto, 633. The principle is of very general application, and has been held to apply to the giving of a check.—*Burns v. City Nat. Bank*, 68 Ala. 278. The principle is, that whenever a fraud has been practiced on a party, by which he was induced to enter into a contract, he may rescind the contract, on discovering the fraud, whenever both parties can be placed in *statu quo*. As to the character of frauds which will justify the rescission of a contract, see *Kennedy v. Kennedy*, 2 Ala. 593; *Nelson v. Wood*, 62 Ala. 176. Even where there was no actual fraud, if one party disables himself from performing his part of the contract, the other may rescind.—*Pharr & Beck v. Bachelor*, 3 Ala. 245; *Pacific Guano Co. v. Mullen*, 66 Ala. 589; Parsons on Contracts, 678, 6th ed. Each of these principles applies to the case of these petitioners. The bank was insolvent, and knew itself to be insolvent; while the petitioners were ignorant of that fact, and would not have taken its worthless exchange if they had known it. This was a fraud, which authorized them to rescind the contract on discovering it, and claim to be remitted to their original position as depositors.—Authorities first above cited. But the bank, notwithstanding its insolvency, had money to its credit with the drawees; and the bills would have been paid on presentation, but for the voluntary assignment of the bank, whereby it prevented performance. This also, under the authorities last above cited, gave the petitioners the right to rescind the contracts, and to claim restoration to the position of depositors.

STONE, C. J.—Within a short time before the Bank of Mobile assigned all its property and effects to Jones for the benefit of its creditors, it sold exchange to Mrs. Eliza A. Jones

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and the other petitioners, which was not presented until after the bank's assignment was made, and was not paid. The funds with which this exchange was purchased had been on deposit with the said Bank of Mobile, and were checked out in the purchase of the exchange. All the exchange, except that in favor of Rosmanick, was what is called domestic exchange, being drawn on the bank's New York correspondent. Rosmanick's bills were drawn on Williams, Deacon & Co., bankers, of London, England. The correspondent bank in the city of New York, on which said domestic exchange was drawn, had ample funds belonging to the Bank of Mobile, with which to pay all said bills drawn on it, and would have done so, had not the payment been countermanded, as hereafter shown. Williams, Deacon & Co. had no funds belonging to the Bank of Mobile; but it is not averred that they would not have accepted and paid the Rosmanick bills, had not the Bank of Mobile, by its assignment to Jones, rendered itself insolvent. Nor is it averred that the Bank of Mobile did not, when it issued the bills, have just grounds for believing they would be accepted and paid by Williams, Deacon & Co., on presentation. It is averred that, when the assignment was made to Jones, he notified the New York correspondent bank not to pay said bills, and on his order the bank's funds on deposit there were placed to his credit as assignee. Mrs. Eliza A. Jones, and the other several holders of said dishonored bills of exchange, filed their petitions in the suit of Winston Jones, assignee, against the Bank of Mobile, and therein set forth substantially the foregoing state of facts. They prayed relief in three alternate respects, to be stated hereafter. There was a demurrer to the petitions, and the chancellor held them insufficient.

1. The first form of relief prayed is rested on the assumption, that by giving the several drafts to its customers, the Bank of Mobile had assigned and set apart so much of its New York deposit as was necessary to meet the several drafts, and such moneys thereby, and without more, became the property of the drawees of the bills. This position, as we understand it, is abandoned in the argument. It is manifestly untenable. *Sands v. Matthews*, 27 Ala. 399; *National Commercial Bank v. Miller*, at present term; Morse on Banking, 2d ed., 29, 302.

2. The second alleged ground of relief is, that the bank, when it issued these bills, was insolvent, and, by withholding knowledge of that fact from its customers, induced them to purchase its exchange, and pay their money for it. This, it is contended, was a fraud on its customers, which arms them with the option of rescinding the contracts; and electing to do so, that they are thereby remitted to their former *status*—that of depositors in the bank. The averments of the petitions do not

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bring the cases within this principle. No intention or deception is averred, nor is it inferable from the facts stated that, at the time the exchange was sold, the bank did not have the means and the confident expectation that the drafts would be honored on presentation. The petitions fail to make a case for relief within this principle.—*Loeb v. Flash*, 65 Ala. 526; *Loeb v. Peters*, 63 Ala. 243; *City National Bank v. Burns*, 58 Ala. 267; *Donaldson v. Farwell*, 93 U. S. 631.

3. The third ground relied on is, that when the bank sold the exchange, it had the means and ability to comply with its contracts, and could have done so, if it had not, by its own voluntary act, deprived itself of the power to comply. This, it is claimed, was a breach of contract on the part of the bank, which absolved the other contracting parties, remitted them to their former rights, and authorized them to treat the contracts as never having had an existence.

There can be no question, that the bank of Mobile, by its assignment, disabled itself to comply with its contract, and that it thereby armed the drawees of the bills of exchange, whose dishonor was caused thereby, with power to treat the contracts as rescinded.—2 Parsons on Contr., 6th ed. 678; *Pac. Guano Co. v. Mullen*, 66 Ala. 582; Anson on Contr. 273. But, what is the result of such rescission? If property had been the subject of contention, and remained in specie, unaltered and undisposed of, the rights consequent on rescission are, that the parties shall be placed in *status quo*, if demanded. Can that be done, when money has been paid, and the claim is to have it restored?

As we have said above, there is no averment in the petitions which tend to show intentional fraud or deception, when the bills of exchange were issued by the bank; and in the absence of such averment, we must presume the bank's intention and expectation, when it sold the exchange, were that the drafts would be honored and paid on presentation. From all that appears, such would have been the result, if they could have been presented before the assignment was made. There was, then, a time when the money was withdrawn, and rightfully withdrawn, from its *status* as a deposit—when it ceased to be a deposit, and did not constitute a debt against the bank. The bank, during that interval, owed nothing on its account, as a deposit. Money, thus used as currency, has no ear-mark, and can not become the subject of a trust *ad rem*. It created a simple new debt, and must share the fate of other general debts and legal liabilities. Such is the general result, when money has been paid on a contract, which is afterwards rescinded.—2 Benj. on Sales, § 1126; *Martindale v. Smith*, 1 Q. B. 365; 1 Whar. Contr. § 282.

Application for *mandamus* denied.

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Bill in Equity by Purchaser, for Conveyance of Legal Title.

1. *Parol evidence ; when admissible to vary or aid writing.*—As between the parties to a valid written instrument, and their privies, parol evidence can not be received to contradict or vary its terms ; but strangers are not estopped from contradicting it, and parol evidence is competent to identify the subject-matter to which it relates.

2. *Same.*—A tract of land being described in the receipt for the purchase-money, which also obligated the vendor to make titles, as “*the Davis Centerfit plantation*,” without other identifying words, or words designating its boundaries or number of acres, extrinsic evidence is admissible to show that the vendor did not claim, and was not in possession of a particular portion of the tract, which had been assigned as dower to the widow of the said Davis Centerfit.

APPEAL from the Chancery Court of Lowndes.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 8th April, 1879, by Mrs. Emma Holly, against McCormick Pruitt and the heirs at law of W. D. Centerfit and F. A. Centerfit, both deceased ; and sought to obtain a conveyance of the legal title to a tract of land, which the complainant's deceased husband, Henry Holly, had bought from said F. A. Centerfit, who bought at a sale made by John A. Tyson, as administrator of the estate of said W. D. Centerfit, under an order of the Probate Court. The entire tract sold, as the complainant claimed, contained one hundred and sixty acres ; and she was in possession of all but about forty-five acres, which had been assigned to the widow of said W. D. Centerfit, prior to the sale by the administrator, as her dower in her husband's estate. At the time of the sale by the administrator, the widow was in possession of this tract of forty-five acres, and she afterwards sold it to the defendant Pruitt, who was in possession when the bill was filed ; and the bill sought to recover the possession of this tract, and to have an account of the rents during Pruitt's possession, after the death of the widow. The material question in the case was, whether or not this tract of forty-five acres was included in the sale made by the administrator, and in the subsequent sale made by F. A. Centerfit to Holly. The complainant claimed the land as the heir at law of an only daughter, who died after her father, said Henry Holly.

The tract of forty-five acres was a part of the south-west quarter of section 36, township 13, range 14, and the whole of

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said quarter-section was included, with other lands, in the order of sale ; but the advertisement of the sale, as copied in an agreement of record signed by the counsel of both parties, described the lands thus : "The plantation belonging to the estate of W. D. Centerfit, deceased, situated in Lowndes county, and containing about one hundred and twenty acres." F. A. Centerfit became the purchaser at the administrator's sale, at the price of \$3.30 per acre. The administrator reported the sale to the court, and it was confirmed, and the administrator was ordered to execute a conveyance to said F. A. Centerfit as the purchaser ; but he died before any conveyance was executed to him. Afterwards, on the 10th February, 1868, the administrator filed a petition in said Probate Court, which, after stating the sale, its confirmation, the order to make title to said F. A. Centerfit, and his death, proceeded thus : "But said F. A. Centerfit, on his death-bed, sold said land to Henry Holly, as your petitioner is informed and believes, and said Holly had fully satisfied him before his death ; and your petitioner, as administrator, respectfully asks a change in the former order of the court, authorizing him to execute the deed to said Henry Holly." This petition was granted, and the administrator was ordered to execute a conveyance of the lands to said Holly ; but Holly died on the 10th February, 1869, never having received a conveyance, and the insolvent estate of said W. D. Centerfit was finally settled and distributed on the 8th March, 1869.

An answer to the bill was filed by Pruitt, denying that the tract of forty-five acres was included in the sale by the administrator, or in the subsequent sale by F. A. Centerfit to Holly ; and asserting title to said forty-five acres by purchase from the heirs of said W. D. Centerfit, to whom the widow had surrendered her dower interest. An answer was also filed by S. P. Centerfit, one of the heirs, neither admitting nor denying the allegations of the bill, but requiring proof of the same so far as material ; and decrees *pro confesso* were taken against the other heirs. John A. Tyson, whose deposition was taken by the defendant Pruitt, testified, in substance, that he did not recollect how much land was sold by him at said administrator's sale, "but his impression is that the dower interest of the widow was never sold ;" that he did not recollect the price per acre at which the land was sold, but the aggregate amount paid, as shown by his memorandum book, was \$379.50 ; and that F. A. Centerfit, who was the purchaser at the sale, afterwards told him that he had only bought one hundred and fifteen acres at the sale, and had only sold that quantity to Holly. James Duncan and Perry Reese, whose depositions were also taken by said Pruitt, both testified that, at the time of the sale by

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Tyson as administrator, the widow was in possession of the forty-five acres previously allotted to her as dower; and that Holly, after his purchase, never asserted any claim to this part of the land, but only claimed about one hundred and sixteen acres. Several objections were duly made by the complainant to portions of the testimony of each of these witnesses, as being irrelevant, and because it tended to vary and contradict the record and written evidence of the administrator's sale; but it is not necessary to state these objections at length. The deposition of Pruitt himself was also taken in his own behalf, in which he stated that he claimed the land under a purchase at a tax-sale, but said nothing about his purchase from the heirs of W. D. Centerfit. If any testimony was taken by the complainant, the present record does not show it; but the note of the testimony, on which the cause was submitted, is omitted from the record by consent.

The cause being submitted for final decree, on the pleadings and proof, the chancellor held the complainant entitled to relief, and ordered a conveyance of the forty-five acres to be executed to her by the register, the possession to be surrendered to her by said Pruitt, and an account of the rents to be taken; and in his opinion accompanying the decree, without passing on the objections to testimony, he said: "It can not be held that the parol testimony in the cause, if admissible, is sufficient to overturn the orders, advertisement, and sworn returns of sale by the administrator." On appeal to this court, by Pruitt, at the December term, 1882, this decree was reversed, and the cause remanded, as shown by the report of the case (73 Ala. 369), on the ground that the complainant had failed to prove the purchase by her deceased husband, and his payment of the purchase-money.

After the remandment of the cause, the complainant produced F. A. Centerfit's receipt for the purchase-money paid by Holly, which was dated November 10th, 1868, attested by two witnesses, and in these words: "Received of Henry Holly seven bales of cotton, weighing 3,500 lbs., amount due me for purchase of my plantation known as the *Davis Centerfit plantation*; and have this day received full payment for said tract of land, and have by these presents obligated myself to give deed and all needed titles to said land on demand." For the purpose of proving the execution of this writing, the complainant took the depositions of said S. P. Centerfit and J. G. Centerfit, who were defendants to the bill, and brothers of said F. A. Centerfit, deceased; and both of them testified to the death of one of the subscribing witnesses to the receipt, the residence of the other in Texas, and the handwriting of said witnesses and of said F. A. Centerfit. In answer to cross-inter-

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rogatories by Pruitt, said S. P. Centerfit stated: "I was not present at the sale of said land in 1868. The widow was in possession of her dower interest in said lands, which had been set apart to her. Her dower interest was not sold, and F. A. Fletcher (?) never bought it. He sold Holly the 115 or 120 acres left after the dower had been set apart. The whole tract consisted of 160 acres, and the dower was, I think, about 45 acres. Holly claimed only what was left after dower was assigned." J. G. Centerfit also testified, in answer to cross-interrogatories: "I was not present at the sale. The widow was in possession of part of the place, as her dower. I don't think Holly ever claimed that portion of the land which was set aside to the widow as her dower. I never heard him say any thing about purchasing, or trying to purchase the dower lands." The complainant filed objections to the cross-interrogatories, on the ground that they called for illegal and irrelevant testimony; but the record does not show that the chancellor acted on them.

The cause being again submitted for decree, on pleadings and proof, the chancellor dismissed the bill, but did not file any written opinion; and his decree is now assigned as error.

G. Cook, for appellant.—On the first hearing of this cause, all the material questions were decided in favor of the complainant; and the chancellor's conclusions were all affirmed by this court on appeal, except on a single point; and the decree was reversed, and the cause remanded, only because there was no legal proof of the payment of the purchase-money by Holly. *Pruitt v. Holly*, 73 Ala. 369. As to the matters thus adjudicated, the former decree is conclusive.—*Lyon v. Foscoe*, 60 Ala. 480; *Marlow v. Benagh*, 60 Ala. 327. After the remandment of the cause, the complainant produced and proved the receipt for the purchase-money paid by Holly, and no question can be raised as to the sufficiency of that proof; yet the chancellor, without giving any reasons for his change of opinion, reversed his former decree, and dismissed the complainant's bill. This second decree can not be founded on the additional evidence adduced by Pruitt, which consisted only of parol testimony as to matters shown by record or written evidence; and if this evidence be admissible, it adds nothing to the weight of the former evidence, which the chancellor himself had held wholly insufficient. But the parol evidence, it is insisted, was inadmissible, and the complainant's objections to it ought to have been sustained.—1 Greenl. Ev. §§ 275-8, 290, 295, 522-5, 96; 1 Best Ev. §§ 218, 223; *Winston v. Browning*, 61 Ala. 80; *Frederick v. Youngblood*, 19 Ala. 680; *Phillips v. Costley*, 40 Ala. 488; *Lee v. Shivers*, 70 Ala. 288; 1 Add. Contr. 364, § 242. All of the defendants in this case were either parties

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or privies to the proceedings had in the Probate Court, and they are concluded by the recitals of the record.—*Waring v. Lewis*, 53 Ala. 615; *Lowe v. Guice*, 69 Ala. 80; 1 Stark. Ev. 252; 1 Greenl. Ev. §§ 522-25; Co. Litt. 103 *a*.

W. R. HOUGHTON, *contra*.—The bill is in the nature of a bill for specific performance, and relief will not be granted unless the complainant's case is clearly made out.—*Daniel v. Collins*, 57 Ala. 625; 1 Brick. Digest, 692, §§ 768-9; also, p. 695, §§ 801-05. On this second appeal, the former decision is not binding, but the court is required to re-examine the whole case. Code, § 3951. Without the aid of the parol evidence to which objections were filed, one fact conclusively shows that the dower lands could not have been included in the administrator's sale; which is, that the whole sum paid, at \$3.30 per acre, was only \$379.50, the price of 115 acres.

SOMERVILLE, J.—It is a settled rule, that parol contemporaneous evidence is inadmissible, to contradict or vary the terms of a valid written instrument. This principle, however, is confined in its operation to the parties to the instrument, or their privies, and is generally applicable only in suits between them. Strangers to the writing are not estopped from contradicting it, by oral proof of facts inconsistent with its recitals. *Venable v. Thompson*, 11 Ala. 147; 1 Greenl. Ev. § 279; 1 Whar. Ev. § 92; *Lehman Bros. v. Howze & Creagh*, 73 Ala. 302.

Nor is the rule infringed at all by the admission of parol evidence to show the nature and qualities of the subject-matter to which the instrument refers. Extrinsic evidence is often admitted in aid of the identification of the subject-matter of sale, when the description in the written instrument, unaided by such proof, would even be void for uncertainty.—*Mitchell v. Meyer Bros.*, 75 Ala. 100; *Chambers v. Ringstaff*, 60 Ala. 140; *Ellis v. Borden*, 1 Ala. 458; *Mead v. Parker* (114 Mass. 413), 15 Amer. Rep. 110; Waterman Spec. Perf. § 236.

The land purchased by Holly from Centerfit is described as "the *Davis Centerfit plantation*," without any other designation. There is no statement as to the quantity of land, or number of acres comprised in the tract. Under this state of facts, evidence was admissible of the circumstances surrounding the vendor, and of the *status* of the thing intended to be sold. The land is shown to have originally comprised not less than one hundred and sixty acres. But it was competent to show that, at the date of sale, it did not embrace so much, but had been diminished in area to about one hundred and fifteen or twenty acres. This was done by showing that the vendor, Cen-

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terfit, never purchased or claimed more than the latter amount, and was only in possession of this particular number of acres; that the forty-five acre tract in controversy had been assigned as dower to the widow of the original owner, who had gone into possession of it, and was in possession at the time of the sale. This evidence was competent to show that it could not have been intended by the parties that the forty-five acre tract in controversy should be conveyed as a part of the "*Davis Centerfit plantation*."—1 Greenl. Ev. (14th Ed.) § 286.

The chancellor's conclusion, that Holly never purchased this tract, and that Centerfit never agreed to convey it to him, is, in our opinion, supported by a preponderance of all the legal testimony in the case; and his decree is accordingly affirmed.

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Bill in Equity by Purchaser, for Specific Performance of Contract for Sale of Land.

1. *Specific performance of agreement for sale of land.*—To authorize the specific performance of an agreement for the sale of land, which rests largely in judicial discretion, and depends upon an equitable consideration of the particular circumstances of each case, the contract must be founded on a valuable consideration, and must be just, fair and reasonable; must not have originated in mistake, surprise, violation of confidence, breach of trust, or advantage of condition, nor been obtained by unconscientious or unfair methods; must be reasonably certain in respect to the subject-matter, the terms and stipulations, and its performance must not work hardship or injustice.

2. *Same; allegation and proof of terms.*—The terms of the contract must be definitely alleged, and must be established as alleged by clear and satisfactory proof; and if any of the terms are left in doubt and uncertainty, or there is a variance between the allegations and the proof as to any of the terms, a specific performance will not be decreed.

3. *Same; entire and partial performance.*—Partial performance of an entire contract will not be decreed; hence, where there are several joint vendors, a specific performance will not be decreed against one only, the others not being parties to the bill, and the stipulations of the contract between them and the complainant never having been performed.

4. *Same; tender, or offer to perform.*—When the stipulations of the contract are mutual and dependent, simultaneous performance by both parties being contemplated and intended, a tender, or offer to perform by the complainant, must generally precede the commencement of the suit; and in all cases, whether such precedent tender be necessary or not, he must aver in his bill an offer, readiness and willingness to perform, submitting himself to the orders and directions of the court.

5. *Same; hardship or injustice to third person.*—Where the contract sought to be enforced was between the children and devisees of a decedent, for the purchase of the family homestead by the complainant, and the widow was induced by him and the defendant, who were trustees for

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her under the will, not to dissent from the will, but to assent to the sale, and to accept the provision thereby made for her, the complainant promising that she should continue to live at the homestead with him, and be treated with kindness and affection; while this promise may not have been intended as a stipulation of the contract, it is an equitable consideration which the court will not disregard; and its performance having become impracticable, by reason of the estrangement which has since arisen between the complainant and the widow, growing out of the contract, a specific performance will not be decreed, since it might work hardship or injustice to her.

APPEAL from the Chancery Court of Pike.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 30th January, 1884, by Thomas J. Carlisle, against M. N. Carlisle and his wife, Mrs. E. B. Carlisle; and sought the specific execution of a contract by which the complainant agreed to purchase, and the said M. N. Carlisle and others agreed to sell and convey to him, their respective undivided interests in a certain tract of land, which constituted the family homestead of their deceased father, Green W. Carlisle, and in which they and the surviving widow were interested as legatees and devisees under his will. The terms of this contract were thus stated in the bill: (*Par. 3.*) "Early in the fall of the year 1882, all of said legatees, being over twenty-one years of age, and otherwise competent to contract, in order to bring about a speedy settlement of said estate, and to avoid the delay and expense of a regular administration under said will, agreed to sell to your orator the land belonging to said estate, upon the following terms: Your orator was to pay one half of the purchase-money in cash, and the balance to be secured by a mortgage or mortgages on the respective (?) on twelve months time, and was to pay \$12.50 per acre for said lands; and said legatees were to execute to him absolute conveyances to their respective interests in said land, which contained 278 acres. The said fee-simple titles were to be executed to your orator upon said cash payment of one half of the purchase-money being made. At the time said contract was made, your orator was in the possession of said land, and said possession was recognized and acquiesced in by all of said legatees; and your orator is now in the possession of said land, and has been ever since the making of said contract of purchase." (*Par. 4.*) "Under the last will and testament of said G. W. Carlisle, Mary E. Carlisle, his widow, was bequeathed a special legacy, consisting of \$500 in money and a horse and buggy, and also a child's portion of the estate after deducting the special legacy; and on the sale of said lands by said legatees, or about that time, it was agreed by your orator and said M. N. Carlisle, who were then acting as executors and trustees under said decedent's will, to allow the said widow, their

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mother, \$700 in lieu of said special bequest, and the same was to remain secured by mortgage to her on said land, to be given by your orator, until her death, and he was to pay the annual interest thereon to her until said time; and at the time when said mortgage was to become payable, your orator was to pay off and discharge the same, by paying \$100 to each of the other six legatees, retaining the same amount (\$100) for himself. Your orator has been informed and believes, and upon such information and belief states, that all of the other legatees approve of and confirm the agreement last above mentioned and set forth."

On final hearing, on pleadings and proof, the chancellor dismissed the bill; and his decree is now assigned as error. The facts of the case, so far as material to the points here decided, appear in the opinion of the court, and any further statement is unnecessary.

GARDNER & WILEY, and W. H. PARKS, for appellant.

N. W. GRIFFIN, *contra*.

CLOPTON, J.—The equitable remedy of specific performance of agreements for the sale of lands rests largely in judicial discretion, directed and regulated by defined rules. Well settled elements and incidents are requisite to granting relief; but whether relief shall be granted depends upon an equitable consideration of the particular circumstances of each case. The contract must be just, fair, and reasonable; must not have originated in mistake, or surprise, or violation of confidence, or breach of trust, or advantage of condition, nor been obtained by any unconscientious or unfair methods; must be reasonably certain in respect to the subject-matter, the terms, and stipulations; must be founded on a valuable consideration, and its performance not work hardship or injustice. — *Moon v. Crowder*, 72 Ala. 79.

That there was an agreement to sell the lands to complainant, is not denied. The terms of the contract, as to which there does not appear to be any controversy, are as follows: The devisees under the will of G. W. Carlisle agreed to sell the lands to complainant for the sum of \$3,475.00. Seven hundred dollars of the purchase-money were to be set apart for the widow of the testator, in lieu of a bequest to her of some personal property, and a pecuniary bequest of five hundred dollars, to be held by complainant and the defendant (M. N. Carlisle), in trust to loan, and pay her the interest thereon annually, and at her death to be divided among his heirs. The balance of the purchase-money was to be paid to the devisees,

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eight in number, the widow being a devisee, in equal proportions; one-half to be paid cash, and the other half in twelve months. On the cash payments being made, the devisees were to make a deed to complainant, who was to execute a first mortgage on the lands to secure the amount set apart to the widow, and a mortgage to each of the devisees to secure the deferred payment.

2. The main disagreement is in reference to the mortgage to be given to the widow. The bill alleges, that the sum of seven hundred dollars, set apart for the widow, was to remain secured by mortgage on the lands, the interest to be paid annually, and the principal payable at her death; to be discharged by the payment of one hundred dollars to each of the other devisees, the complainant retaining the same amount for himself. In his testimony the complainant says, the sum was to remain secured by the land, so long as he paid the interest promptly. The widow claimed, that the aggregate of the amounts going to her was to be payable at twelve months from the sale, and that the mortgage should be executed accordingly. It is unnecessary for us to determine which version is correct. It is obvious there is a variance between the allegations of the bill, and the testimony of complainant, in respect to the terms of the mortgage, and between both of these and the evidence of the widow and M. N. Carlisle. The terms of the contract must be definitely alleged, and established, as alleged, by clear and satisfactory proof. If the evidence fails to prove the contract, or any of its terms are left in doubt or uncertainty, a specific performance will be refused.—*Moon v. Crowder*, 72 Ala. 79; *Aday v. Echols*, 18 Ala. 353. Doubt and uncertainty as to the terms of the contract arise on the evidence.

3. The sale was joint; the contract was an entirety. The delivery of the deed, and the delivery of the mortgages, evidently, were to be simultaneous acts. All the mortgages were to cover the entire lands. The cash payments have not been made, nor have the mortgages been executed, to several of the devisees; and no payment, as interest or otherwise, has been made to the widow. The evidence tends to show, there has been no delivery of the deed signed by the devisees, which is in the possession of the complainant, so as to give it effect as a conveyance, or by which the grantors parted with dominion over it. Holding the deed, and claiming it as a valid conveyance as to all except the defendants, a specific performance by one of the several vendors will not be decreed in favor of the complainant, in the absence of a performance of, or an offer to perform, the conditions required of him as to the other vendors. The court can not ignore the prospect of other and subsequent suits between the complainant and the other devisees,

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and can not afford to encourage and promote a multiplicity of suits, by decreeing, in such case, specific performance by the defendants alone. There must be performance of the entire contract, or of no part thereof.

4. It is not essential, in all cases, that the complainant shall make an actual tender of performance, before bringing suit. Circumstances may render such tender impracticable, or unnecessary. When the stipulations are mutual and dependent—simultaneous performance by both contracting parties being intended—a tender should, ordinarily, precede the commencement of the suit. And whether a precedent tender is requisite, or may be dispensed with, the complainant should aver in his bill readiness and willingness, and an offer to perform, submitting himself to the orders and directions of the court, and entitling the defendant to a decree, whereby the rights of all the parties to the contract may be ascertained and protected. *Jenkins v. Harrison*, 66 Ala. 345; *Gentry v. Rogers*, 40 Ala. 442; *Bell v. Thompson*, 34 Ala. 633. It is true, that neither the widow nor the other devisees are made parties to the bill; but, on a bill of this character, the rights of parties to an entire and indivisible contract, though not parties to the suit, are considerations which a court of equity must regard in adjudicating the right of complainant to a specific performance by one party.—*Curran v. Water Works Co.*, 116 Mass. 90.

5. The widow had on several occasions expressed an intention to dissent from the will of her husband, and take her dower, moved by the natural sentiment to live and die at the homestead, where they had resided for many years, and where he died. She was dissuaded from this course, and induced to consent to the contract of sale, by the complainant and the defendant, M. N. Carlisle, by assurances that she could continue to live at the homestead with complainant, and be kindly and affectionately treated. They were her sons, executors of the will, and trustees of the pecuniary legacy in her favor. Two-fold relations of trust and confidence existed. The mother has left the homestead, because of her son's treatment, as she alleges, but denied by him. Since then, the complainant has made no provision for her support, by paying, or offering to pay the interest, either on the pecuniary legacy, or on the amount set apart for her by the agreement. He has not discharged his duties as trustee. Without indicating any opinion on whom rests the fault, the deplorable estrangement between mother and son renders their living together impracticable, and this consideration is incapable of enforcement. While it may be that it was not expected to incorporate this incident of the contract in any written instrument, it constitutes an equitable

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consideration, which, in a case like this, the court ought not to disregard, as it might work hardship and injustice.

We do not deem it necessary to consider the matters of personal difference between the complainant and the defendant, or to determine the validity at law of the contract. In our view of the case, the former are immaterial; and conceding that the agreement is binding, it does not necessarily follow that a specific performance will be decreed. There are contracts, which a court of equity will not specifically enforce, but leave the parties to their legal remedies.. A less strong case is sufficient to defeat, than is requisite to obtain specific performance.

Affirmed.

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Garnishment in Pending Suit; Contest with Claimant.

1. *Action for money had and received, for surplus proceeds of sale in hands of sheriff.*—An action for money had and received is, to some extent, an equitable action; and it may be maintained by a married woman, against the sheriff, to recover the surplus proceeds of sale of lands conveyed to her by her husband by deed of gift, which were afterwards sold under an execution against him having a prior lien, although the deed created in her only an equitable estate in the lands.

2. *Fraud vel non; charge invading province of jury.*—Where the plaintiff claims the money in controversy under a deed of gift from her husband, which is assailed on the ground of fraud in fact, the issue of fraud *vel non* is a question for the jury, and a general charge in favor of the defendant is an invasion of their province.

3. *Judgment against garnishee, and against claimant of fund.*—When a garnishment is sued out in aid of a pending action (Code, § 3219), and a claimant of the fund in the hands of the garnishee, being summoned, propounds his right and interest; the issue being tried before judgment has been rendered in the original suit, a judgment for costs may be rendered against the claimant, and his claim be declared invalid; but it is irregular to render judgment final against the garnishee, in favor of the plaintiff, with an award of execution.

4. *Insolvency of defendant's estate, before judgment against garnishee.* On the death of the defendant pending the suit, the action being revived against his administrator, who afterwards reports the estate insolvent, and suggests to the court that it has been reported and declared insolvent, no valid judgment can afterwards be rendered against the garnishee.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. JOHN P. HUBBARD.

The original action in this case was brought by G. F. Holloway, against S. J. Seals, and was commenced on the 16th Janu-

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ary, 1882; the cause of action being the defendant's promissory note for \$850, which was dated July 27th, 1881, and payable to the plaintiff or bearer. An ancillary garnishment was sued out against John H. Morgan, the sheriff of the county, as the debtor of the defendant; who filed an answer, admitting that he had in his hands the sum of \$869.89 belonging to the defendant, being the surplus of the proceeds of sale of certain lands sold by him under execution against the defendant, and remaining in his hand after satisfying the execution in full; and he afterwards suggested to the court that Mrs. R. C. Seals, the wife of the defendant, claimed the money. Afterwards, the death of the plaintiff was suggested, and the cause was revived in favor of his administrator; and the death of the defendant being also suggested, the action was revived against said Morgan, the sheriff, as his administrator. Other proceedings were had in the cause, as stated in the opinion of the court.

Mrs. Seals having appeared, and propounded her claim, an issue was made up between her and the plaintiff, which was submitted to a jury at the Spring term, 1884; and on the trial she reserved a bill of exceptions, in which the facts are thus stated: "The claimant introduced in evidence a certain deed of gift from her husband, said S. J. Seals, dated June 17th, 1881, which conveyed to her, with other property, the storehouse and lot sold by said Morgan as sheriff under the execution in favor of Lehman, Durr & Co.; which deed was recorded on the 9th January, 1882. It was in evidence, also, that the debt in favor of Lehman, Durr & Co., on which said execution issued, accrued before said deed of gift was executed; and the evidence further tended to show that the plaintiff's debt in this case, on which the garnishment was sued out, accrued before said deed was executed, although the note sued on was dated afterwards; and there was evidence, also, tending to show that said note was given for a present moving consideration at the time it was executed. There was evidence, also, that said deed of gift was executed with the intent to hinder, delay or defraud the existing and subsequent creditors of said S. J. Seals; and other evidence, on the contrary, that it was executed *bona fide*. Morgan, as sheriff, had sold the storehouse and lot under execution against said S. J. Seals; and after paying off and satisfying said execution in full with the proceeds of sale, there was left in his hands a surplus of \$869.89. Morgan is the administrator of said S. J. Seals, and is the defendant in the suit as such administrator; and he is also the garnishee. This was, in substance, all the evidence. The court, being of opinion that, if the claimant had any right to said surplus in the hands of the garnishee as sheriff, she could only assert it in a court of equity, charged the jury in writing, on

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the request of the plaintiff, that they must find for the plaintiff, if they believed the evidence; to which charge the claimant excepted."

On the verdict of the jury, the court rendered judgment for the plaintiff, as follows: "It is therefore considered by the court, that the plaintiff recover of said garnishee, John H. Morgan, the sum of \$869.89, the amount admitted by his answer to be due to the defendant; for which let execution issue." On a subsequent day of the same term, May 9th, 1884, Morgan, as administrator, suggested to the court that his intestate's estate had been reported insolvent; and the court thereupon ordered and adjudged "that this cause be continued to await return on that report." At the next term, on the 20th October, 1884, judgment by *nil dicit* was rendered against the defendant in the original suit, as follows: "The defendant saying nothing in bar or preclusion of the plaintiff's demand, it is therefore considered by the court, that the plaintiff recover of the defendant, John H. Morgan, the administrator of said S. J. Seals, deceased, the sum of \$1057.76, for his damages, and also the costs; for which let execution issue. And it appearing that the estate has been declared insolvent, this judgment, with the costs, is certified to the Probate Court of Pike county, and no execution will issue from this court."

The charge of the court to the jury is the only matter now assigned as error.

W. D. ROBERTS, and M. N. CARLISLE, for the appellant, cited *Niolin v. Hamner*, 22 Ala. 578; *Hurt v. Redd & Co.*, 64 Ala. 85.

STONE, C. J.—There is no controversy in this case that the store-house and lot in Troy were subject to the execution in favor of Lehman, Durr & Co., under which they were sold. To the extent the proceeds were required to pay that claim, the sale was rightfully made. But the sale was entire, yielding a surplus above the execution. That was an unavoidable result, or it was an abuse. If the property was not reasonably susceptible of division, so as to sell only a part, and satisfy the execution with the proceeds of the part sold, then it was unavoidable. We feel bound to presume such was the case, for two reasons: first, there is no complaint on account of the entirety of the sale; and, second, in the absence of proof to the contrary, we presume the sheriff did his duty. The sale being entire, a surplus was left, and that surplus was money, having become such by a rightful sale; and it results necessarily, that that money became the property of the person, whoever it

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might be, who owned the *residuum* of the property, after paying the Lehman, Durr & Co. debt.

The claim of Mrs. Seals rests on a voluntary conveyance made by her husband, S. J. Seals, to her, alleged to bear date June 17, 1881. Holloway's claim, as shown by his complaint filed, is a note made by said S. J. Seals, bearing date July 27, 1881. There was conflict in the testimony, whether in fact the deed was executed before the debt was incurred by S. J. Seals, under which Holloway made claim; and, conceding, for argument's sake, that the deed of gift was prior to the creation of the debt to Holloway, there was conflict in the testimony, whether or not the deed of gift was made with actual fraudulent intent, so as to render the property liable to debts incurred afterwards. These were the issues of fact raised before the jury. The court, at the request of plaintiff, gave to the jury the written charge, that if they believed the evidence, they should find the issue in favor of the plaintiff, Holloway's administrator. This ruling is assigned as error. In the bill of exceptions it is shown that the circuit judge's ruling was influenced by his opinion, that if Mrs. Seals was entitled to the money, she could assert her claim only in the Chancery Court.

There is, neither in the transcript, nor in the argument of counsel, anything by which we can determine on what ground the ruling of the court is attempted to be justified. If it be rested on the principle, that the deed from Seals to his wife could, at most, vest an equitable title in her (*McMillan v. Peacock*, 57 Ala. 127), and that such equitable title will not uphold an action at law, the answer is, that that principle does not apply when money is the subject of contestation. Assumpsit for money had and received is, to some extent, an equitable remedy, and may be maintained when one man holds money which, *ex æquo et bono*, belongs to another, unless there is a trust account, or some matter of purely equitable cognizance, involved in the controversy.—*Boggs v. Price*, 64 Ala. 514; *Westmoreland v. Foster*, 60 Ala. 447; *Collier v. Faulk*, 69 Ala. 58.

We have seen that, by legitimate methods, the claim of Mrs. Seals in the house and lot had become money. If her theory of the facts be the true one, that money, *ex æquo et bono*, belonged to her. The Circuit Court erred in taking from the jury the consideration of the inquiry, whether the deed of gift antedated the creation of the debt to Holloway, and whether or not it was not tainted with intentional fraud.—*Niolin v. Hammer*, 22 Ala. 578; *Hurt v. Redd*, 64 Ala. 85; *State v. Pool*, 5 Ire. Law, 105; *State v. Read*, 6 Ib. 80; *Acervill v. Loucks*, 6 Barb. 470.

Lest injustice be done in the further progress of this case,

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we will notice certain other points suggested by the record. Holloway instituted suit against Seals, February 6, 1882. On the same day, he made the statutory affidavit, gave bond, and sued out statutory garnishment in aid of his suit, summoning Morgan, sheriff, as garnishee. On the 28th April, 1882, the death of defendant Seals was suggested, and leave was granted to revive. Morgan was subsequently appointed his administrator, and the suit was revived against him as such. At the April term, 1882, Morgan, the garnishee, answered, stating a sum of money in his hands, surplus of the proceeds of the sale of the house and lot under the Lehman, Durr & Co. execution. At the next October term, 1882, Morgan, with leave, amended his answer, setting forth that Mrs. R. C. Seals claimed the money as hers; and notice was ordered to her, returnable to the Spring term, 1883, requiring her to come in and contest with plaintiff the *bona fides* of the transfer. She came in, and propounded her claim, founded on the said voluntary deed of June 17, 1881. An issue was formed, and that issue was tried, and determined against Mrs. Seals, at the April term, 1884. The main suit against Morgan, administrator of Seals, was not tried until October term, 1884. Before that time, the estate of Mr. Seals had been declared and decreed insolvent; and the purpose of the trial was not to obtain an active, available judgment against Seals' estate, but to ascertain and establish the amount due, that it might be certified to the Probate Court, as a valid claim against the insolvency.—Code of 1876, § 2581. Such was the course pursued in this case. As early as May 9, 1884, Morgan, the administrator, suggested, or pleaded, that the estate of his intestate, Seals, had been declared insolvent. Yet, notwithstanding the main suit against Morgan, administrator, had not been tried, and it could not then be shown whether any and what judgment would be rendered in such main suit, at the termination of the contested trial between Holloway's administrator and Mrs. Seals, at the Spring term, 1884, a judgment was rendered, that the plaintiff recover of Morgan, the garnishee, the sum admitted in his answer to be in his hands, and execution was ordered to issue. The judgment went too far. It should, at that stage, have only adjudged her claim to be invalid, and further, that she pay the costs of the contest. The question of the garnishee's liability on his answer should have been continued, until judgment was recovered in the main cause. Till then plaintiff had no predicate, or foundation for a judgment against the garnishee.

A graver question: Seals' estate was decreed insolvent, before the trial of the main suit. There never was, or could be a judgment proper—a vital judgment—recovered in that suit. The decree of insolvency of Seals' estate, rendered before final

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judgment against it, was a perfect bar to the plaintiff's right of recovery against the garnishee.—*McEachin v. Reid*, 40 Ala. 410; *Drake on Attachments*, 6th ed. § 459; *Woodfolk v. Ingram*, 53 Ala. 11; *McClellan v. Lipscomb*, 56 Ala. 255; *Phillips v. Ash*, 63 Ala. 414; *Giddens v. Williamson*, 65 Ala. 439.

Reversed and remanded.

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Bill in Equity for Injunction of Sale under Mortgage, an Account, and Redemption; Cross-Bill for Reformation and Foreclosure.

1. *Trust funds; when followed into hands of third person.*—Trust funds may be followed into the hands of a third person, so long as they can be satisfactorily traced and identified, although he has taken the title to the property purchased with them in his own name; but, to authorize this relief, the facts must be averred with distinctness and precision, and must be proved by full, clear, and convincing evidence.

2. *Protection to mortgagee, as bona fide purchaser.*—A mortgagee of property purchased with trust funds, if he had no notice of that fact, and is a *bona fide* purchaser for value, is entitled to protection against the implied trust arising from such investment of the trust funds; but, if the debt secured by the mortgage is tainted with usury, he is not a *bona fide* purchaser for valuable consideration.

3. *Foreclosure of mortgage; money decree against mortgagor.*—On the foreclosure of a mortgage in equity, a personal decree may be rendered against the mortgagor in the first instance, for the amount due on the mortgage debt, as ascertained under a reference; although an execution can not be issued on such decree (Code, § 3908), until after the mortgaged property has been sold and the sale has been confirmed, and then only for the balance remaining due.

APPEAL from the Chancery Court of Bullock.

Heard before the Hon. JOHN A. FOSTER.

The original bill in this case was filed on the 20th July, 1882, by Mrs. Serena McCall, against James R. Rogers and others; and sought, principally, to enjoin a sale of property under two mortgages, which had been executed to said Rogers by the complainant and her son, H. G. McCall, who was made a defendant to the bill, and also for an account, and for relief on the ground of usury. Daniel and Rena McCall, infant children of the complainant, were also made defendants to the bill, under an allegation that they had or claimed some interest in the mortgaged property. Copies of the two mortgages to Rogers were made exhibits to the bill. The first was dated the 16th December, 1879, and conveyed certain lands in Bullock county,

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with a residence lot and other lots in Union Springs; and it purported to secure an indebtedness of the complainant and said H. G. McCall to said Rogers, evidenced by their two promissory notes, one for \$1,170.90, and the other for \$685, each of even date with the mortgage, and payable twelve months after date. As to these notes, the bill alleged that they were given for money borrowed from said Rogers by said H. G. McCall, and that each included usurious interest on the money borrowed at the rate of one per-cent. a month. The second mortgage, which was dated January 31st, 1881, and conveyed another lot in Union Springs, recited the indebtedness of the mortgagors as evidenced by the said note for \$1,170.90, and also by two other notes, one for \$143.83, and the other for \$27.75, and that it was given in consideration of forbearance to foreclose the former mortgage until the 16th December, 1881; and the bill alleged that these two small notes were given for the unpaid interest, at the same usurious rate, on the two larger notes. This second mortgage recited, also, that the property conveyed by it was incumbered with another mortgage for \$535, in favor of T. J. Alsop. Each of these mortgages was duly proved and recorded; and said Alsop was brought in as a defendant by an amended bill.

An answer to the bill was filed by Rogers, admitting the charge of usury in the mortgage debt, and alleging a mistake in the description of the lands conveyed by the first mortgage; and asking that his answer might be taken as a cross-bill, that said mortgage might be reformed, and that both mortgages might be foreclosed by a sale of the property. A guardian *ad litem* having been appointed for the infant defendants, Daniel and Rena McCall, he filed an answer, alleging that nearly \$3,000 belonging to said infants was lent by their guardian, H. G. McCall, to their mother, the complainant in the bill, and was used in payment of the purchase-money of the town property, and in making necessary repairs and improvements on the house; that, to secure the payment of the money so borrowed and used, Mrs. McCall executed her two promissory notes to said H. G. McCall, as guardian of said infants, each for the sum of \$1,400, and a mortgage on said property of even dates with the notes, August 5th, 1880; and he prayed that his answer might be taken as a cross-bill, and that said mortgage might be foreclosed. This mortgage was not recorded, and Rogers had no notice of it when he loaned his money to said H. G. McCall and Mrs. McCall; and he filed an answer to said cross-bill, alleging that he had no notice, actual or constructive, of said mortgage and trust in favor of the infants. A decree *pro confesso*, on the original bill, was duly entered

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against said H. G. McCall, but not on the cross-bill of Rogers, nor was any answer to said cross-bill filed by him.

The cause being submitted for decree on pleadings and proof, the chancellor ordered an account to be stated by the register of the amounts due on the several mortgage debts; and on the coming in of the register's report, which was confirmed without objection, he rendered a decree foreclosing the several mortgages, after which the decree thus proceeded: "It is further ordered, adjudged, and decreed, that the complainant and H. G. McCall pay to said T. J. Alsop the sum of \$573.95, with interest from March 10th, 1884; and that the complainant and said H. G. McCall pay to said James R. Rogers the sum of \$1,595.75, with interest from March 10th, 1884; . . . and that complainant pay to said H. G. McCall, guardian as aforesaid, the sum of \$3,383, with interest from March 10th, 1884, the same being the amounts reported by the register to said mortgagees respectively on said 10th March, 1884; and it is further ordered, adjudged, and decreed, that if said sums, with interest, as herein provided, are not paid within thirty days after the adjournment of the court, the register will proceed to sell said real estate," &c.

From this decree Mrs. McCall appeals, and assigns as error: 1st, the decree against her on the second mortgage of Rogers; 2d, the decree against her on the cross-bill of Rogers, before service was perfected on H. G. McCall; 3d, the decree giving a preference to the second mortgage of Rogers over the rights of the minor defendants; 4th, the personal decree rendered against her before a sale of the mortgaged property.

By consent, there were cross assignments of error by H. G. McCall, and by the infant defendants. The errors assigned by McCall were: 1st, the personal decree against him before the sale of the mortgaged property; 2d, the decree against him on the cross-bill of Rogers, when the cause was not at issue as against him; 3d, the decree giving a preference to the second mortgage of said Rogers over the mortgage to said McCall as guardian for said infants. The errors assigned by the guardian *ad litem* of the infants were: 1st, the decree giving a preference to the second mortgage of Rogers over the mortgage to said McCall as their guardian; 2d, "every order and decree made against them or their interest."

ARRINGTON & GRAHAM, and WATTS & SON, for the appellant, and for each of the parties who assigned errors, cited *Cox v. Railroad Co.*, 37 Ala. 320; *Bolling v. Muncus*, 65 Ala. 558; *Saltmarsh v. Tuthill*, 13 Ala. 390; *Carlisle v. Hill*, 16 Ala. 398; *Wailes v. Couch*, 75 Ala. 134; *Carrington v. Callier*, 2 Stew. 175; *Pettit v. Pettit*, 32 Ala. 288; *Wynn v. Whisenand*,

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37 Ala. 46; Parsons on Contracts, vol. 1, 457; Story on Contracts, § 459; Chitty on Contracts, 575, 597; *Saffold v. Wade*, 51 Ala. 214; *Shorter v. Frazier*, 64 Ala. 74; *Chiles v. Boone*, 10 Peters, 177; *Prout v. Hoge*, 57 Ala. 28; *Wright v. May*, 40 Ala. 550.

SOMERVILLE, J.—Trust funds can be followed into the hands of a third person, so long as they can be satisfactorily traced and *identified*, although such person may have taken the title to the property, in which such funds are invested, in his own name.—*Parker v. Jones*, 67 Ala. 234; 2 Perry on Trusts, §§ 828; *Whaley v. Whaley*, 71 Ala. 159. But, to induce courts of equity to establish a trust of this nature, not only is it required that the facts, from which the trust originates, should be averred with distinctness and precision, but they must be proved by “clear, full, and convincing evidence.”—*Mobile Life Ins. Co. v. Randall*, 71 Ala. 220; *Lehman v. Lewis*, 62 Ala. 129.

In all such cases, moreover, it is a settled rule, that a mortgagee, who is a *bona fide* purchaser for value of such property, will be entitled to protection against this prior equity, of which he has had no notice, or of any other secret trust or conveyance. *Rogers v. Adams*, 66 Ala. 600; *Mobile Life Ins. Co. v. Randall*, *supra*.

The evidence manifestly fails to show satisfactorily that the lands mortgaged to the defendant Rogers were purchased with any specific trust funds belonging to the minors in whose behalf this equity is sought to be asserted by cross-bill. There is a total failure of proof as to the identity of these funds.

The chancellor erred, however, in giving the second mortgage of the defendant Rogers, bearing date in January, 1881, the priority over that executed on August 5th, 1880, to H. G. McCall, as guardian of the minor children, Daniel and Rena McCall. The latter conveyance is prior in point of time to Rogers' second mortgage, which was executed by the complainant on the same property. And although it was not recorded, and Rogers probably had no notice of its existence, he was not a *bona fide* purchaser for a valuable consideration, and can not, for this reason, claim protection against the prior equity of these minors. The claims or notes of Rogers, which were secured by this mortgage, were in fact usurious; and under the authority of *Wailes v. Couch*, 75 Ala. 134, and other previous rulings of this court upon which that case was founded, he can not be regarded as a *bona fide* purchaser. A contract, based on a consideration which is against the pronounced policy of the law, has an element of *mala fides* in it.—*Saltmarsh v. Tuthill*, 13 Ala. 390; *Carlisle v. Hill*, 16 Ala. 398.

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We need not notice the assignments of error based on the omission to serve notice of Rogers' cross-bill on H. G. McCall, as this is susceptible of easy remedy on remandment of the cause.

It is claimed that the chancellor erred in rendering a personal decree against the appellant, Mrs. Serena McCall, before a sale of the mortgaged property. The statute does not prohibit the rendition of a decree personally against the mortgage debtor, in cases of this nature. On the contrary, it declares that, when an account is taken between the parties, and "the amount of indebtedness between them is ascertained" by the decree of the chancellor, such decree shall, of itself, have "the force and effect" of a judgment. The only prohibition is against the issue of an execution on such decree, until the mortgaged property shall have been sold, and the sale confirmed, and the balance due is ascertained by the decree of the court, "when execution must issue for the balance which may be found due."—Code 1876, §§ 3908-9.

For the error above mentioned, of failing to give the mortgage executed to H. G. McCall, as guardian, priority over the second mortgage of Rogers, the decree of the chancellor is reversed, and the cause remanded.

CLOPTON, J., not sitting, having been of counsel.

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Bill in Equity by Judgment Creditor, for Discovery and Sale of Debtor's Property.

1. *Allegations of creditor's bill for discovery.*—A judgment creditor, having an unsatisfied execution, may file a bill in equity for discovery and relief under the statute (Code, § 3882), without alleging fraud on the part of his debtor, or the concealment of his property with intent to hinder, delay, or defraud his creditors; and he may frame its allegations in the alternative.

2. *Same.*—If the bill alleges that, at the time of the rendition of the complainant's judgment, the defendant owned and held lands particularly described: that he and his wife have conspired to defraud complainant; that the wife now pretends to own and hold the lands, with all the other property belonging to her husband; and that if he ever executed to her any deed or other writing, it was executed after the complainant's rights had accrued, was without valid consideration, and executed with intent to defraud complainant; these allegations are not equivalent to an averment of a fraudulent conveyance by the debtor to his wife.

3. *Conveyance by husband to wife; proof of consideration as against*

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creditor ; hearing on bill and answer.—As against creditors of the husband existing at the time of the execution of a conveyance by him to his wife, the *onus* is on her to show the payment of a valuable consideration ; but an indebtedness on his part, for moneys belonging to her statutory estate, by him received and converted, or appropriated to his own uses, is a valuable consideration ; and where such consideration is set up in an answer under oath to a bill for discovery, and in response to special interrogatories attached to the bill, and the hearing is on bill and answer only, the complainant is not entitled to a decree subjecting the lands to the satisfaction of his debt.

APPEAL from the Chancery Court of Pike.

Heard before the Hon. N. S. GRAHAM.

The bill in this case was filed on the 30th August, 1883, by Theophilus Floyd, a judgment creditor of Benjamin E. Floyd, with an execution returned “No property found,” against the said Benjamin E. Floyd and his wife, Mrs. M. G. Floyd ; and sought a discovery as to the property and assets of the said Benjamin E. Floyd, and a sale of so much thereof as might be necessary to satisfy the complainant’s judgment. The complainant’s judgment was for \$250 damages, and \$94.35 costs, and was rendered in the Circuit Court of Pike, on the 19th April, 1881, in an action of trespass commenced on the 14th October, 1879. An execution on the judgment was levied, August 17th, 1881, on a tract of land containing 335 acres, and the complainant became the purchaser at the sale ; but the defendant’s wife giving notice at the sale that the land belonged to her, the purchase was not consummated, and other executions were returned “No property found.” As to this tract of land, the bill contained these averments : “Your orator charges and avers that all of said lands are owned and held by said Benjamin E. Floyd in his own name and right, and that he alone claimed said lands up to the time said suit was brought, and was the owner thereof, and said lands were held by him in his own name up to the time of the rendition of said judgment ; . . . that said Benjamin has money, property or effects, which are liable to the payment of said judgment ; that the said Benjamin and his said wife have conspired and confederated together, and she (the said M. G. Floyd) pretends to hold and own said property, and all other property belonging to the said Benjamin, to hinder, delay and defraud your orator in the collection of his said judgment ; that if there is any deed, or other writing to said property, by said Benjamin Floyd to his said wife, the same was executed without any legal or valid consideration, and was voluntary, after the rights of your orator had accrued ; and that said transactions between said Floyd and his wife were entered into between them to hinder, delay, and defraud your orator in the collection of his said debt ; that the said M. G. Floyd had no estate at the time she married the

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said Benjamin, nor has she inherited any such estate since her said marriage, nor has she received any gift of any such estate, unless it be a gift by said Benjamin E. Floyd to defeat your orator in the collection of his said debt." Answers on oath were required, and special interrogatories were annexed to the bill, which the defendants were required to answer, as stated more fully in the opinion of the court.

The defendants demurred to the bill, assigning the following as grounds of demurrer: 1st, "because said bill alleges that said Benjamin E. Floyd conveyed his property to his co-defendant, without averring that such conveyance was made with intent to hinder, delay, or defraud creditors;" 2d, "because said bill alleges that said Benjamin E. Floyd conveyed his property to his co-defendant with the intent to hinder and delay the complainant in the collection of his said judgment;" 3d, "because said bill is multifarious, in that it sets up fraud on the part of the defendants as a ground of relief, and, at the same time, avers separate and independent facts as entitling him to relief;" 4th, "because said bill contains alternative grounds which do not entitle the complainant to the same relief."

The demurrer was overruled by the chancellor (Hon. JOHN A. FOSTER), and the defendants then filed a joint answer, in which they denied the charges of fraud, alleged that Mrs. Floyd had a statutory estate, and that the lands described in the bill belonged to her; and in their answers to the interrogatories they described the several conveyances under which she held the lands, stated their consideration, and made them exhibits. Among these deeds was a conveyance of eighty acres of the land, executed by the said Benjamin E. Floyd to his wife, which was dated March 15th, 1880, and recited the payment of \$300 as its consideration. The cause was submitted for decree on the bill and answer, with the respective exhibits thereto; whereupon the chancellor rendered a decree for the complainant, ordering a sale of the eighty acres of land for the satisfaction of his judgment.

The appeal is sued out by the defendants, who here assign as error the overruling of their demurrers to the bill, and the final decree.

WM. H. PARKS, for the appellants.

N. W. GRIFFIN, and W. D. WOOD, *contra*.

CLOPTON, J.—Omitting all superfluous allegations, the bill must be construed as filed by a judgment creditor having an unsatisfied execution, under section 3882 of the Code, for

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the purpose of discovering any property belonging to the judgment debtor, or held in trust for him. Such a bill is in aid of the execution at law, and entitles the complainant to a discovery of all the property, real and personal, legal and equitable, which the defendant owned, or had an interest in, at the time the judgment was obtained. The bill may be general in its allegations, and they may be in the alternative; but the complainant is not required to allege fraud on the part of the debtor, or the concealment of his property with the intent to hinder, delay, or defraud his creditors.—*Brown v. Bates*, 10 Ala. 432.

There is no allegation that any fraudulent conveyance or disposition of his property has been made by the debtor, which the bill seeks to annul. The averments are, substantially, that the debtor owned and held in his own name the lands mentioned in the bill, to the time of the rendition of the judgment; that he and his wife have conspired to defraud complainant, and the wife *pretends* to own and hold the lands and all other property belonging to her husband; and if any deed or other writing was made by him to her, it was made after the rights of complainant had accrued, without any valid consideration, and with intent to defraud complainant. The allegation of a pretense to own and hold is not equivalent to an averment of a conveyance or transfer to her by the husband. On the bill being taken confessed, the court could render no decree annulling or avoiding any particular conveyance or transfer. The bill is not framed for the purpose of subjecting property alleged to have been fraudulently transferred, but for discovery and relief under the statute. So construed, the bill is not obnoxious to the *specified* causes of demurrer, in whatever other respects it may be defective.

An answer under oath was required, and the submission was on bill and answer. The answer stated, that the defendant debtor did not own any of the property in the bill mentioned, but that it belonged to the wife; and disclosed several conveyances of land to Mrs. Floyd, one of which was made by her husband in 1880. No discovery of any property belonging to the judgment debtor was made, other than that the land conveyed to his wife formerly was his property. It may be conceded, that in respect to this land the *onus* was on Mrs. Floyd to show a valuable consideration paid. It has been uniformly held, that a deed by the husband to the wife in payment of money, being her statutory separate estate, converted or used by him for his own purposes, is founded on a valuable consideration. By an interrogatory authorized by the averments of the bill, the defendants were called on to discover whether either of them owned the lands, or any parts of them, in the bill mentioned, and if so, from whom, and when acquired, and

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what was paid for them, and to attach copies of the several deeds. In response to this interrogatory, the answer attaches copies of the various deeds, and states the amount of purchase-money paid for each parcel. As respects the land conveyed by the husband, it states that the conveyance was made to reimburse the wife for money and property of her statutory separate estate, which he had converted and used for his own purposes, and also the times when, and the sources from which derived, and the amount received from each source. The answer is responsive to the interrogatory, and must be taken as true, not being controverted.—*Fenno v. Sayre*, 3 Ala. 458.

It was competent for the complainant to have disproved the denials and statements of the answer; but no evidence was offered for that purpose. The answer denying all fraud, and showing responsively a valuable consideration, in the absence of such evidence, the lands are not subject to complainant's judgment.

Reversed, and a decree will be here rendered dismissing the bill, at the costs of appellee, in this court, and in the Chancery Court.

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Action by Railroad Corporation, on Subscription for Stock.

1. *Fraudulent representation; matters of opinion, or matters equally open to both parties.*—The mere expression of an opinion can not be a fraudulent representation, unless falsely made, with intent to deceive, and actually deceiving; nor can it constitute a fraud, vitiating a contract thereby procured, when it relates to a matter equally open to both parties.

2. *Subscription for stock in railroad company, procured by fraud of agent.*—A subscription to the stock of an incorporated railroad company, procured by the fraud of the company's agent soliciting subscriptions, may be defeated on the plea of fraud, when the company attempts to enforce it by suit.

3. *Fraudulent representations to other persons.*—There are cases of fraud, and other unlawful acts, particularly acts of the same general character continuous in their nature, where it is permissible to prove other similar transactions occurring at or about the same time, as shedding some light on the particular transaction in controversy; but, in an action against a subscriber for stock in a railroad company, who defends on the ground of fraudulent representations by the company's agent in procuring his subscription, he cannot be allowed to prove similar representations made by said agent to other subscribers in the same neighborhood.

4. *False representation constituting failure of consideration.*—A state-

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ment as of fact by the vendor of an article, on which the purchaser has a right to rely, and on which he does rely, purchasing on the faith of it, constitutes, if false, a good defense to an action for the purchase-money, though not known by the seller to be false; and this, not on the ground of fraud, but of failure of consideration; but this principle does not apply to a statement which is merely the expression of an opinion.

5. *False representations by agent, as to location and completion of road.* Representations by the agent of a railroad corporation, soliciting subscriptions for stock from persons living along the contemplated route of the road, as to its intended location, and the time within which it will be completed to a particular place, are but the mere expression of an opinion, and neither constitute a fraud, nor are available as a defense to an action on a subscription for stock made on the faith of them, unless known by the agent to be false, and made by him with intent to deceive.

6. *Same; injunction against enforcement of subscription.*—Although an action on the defendant's subscription for stock can not be defeated on the ground of fraud, when the representations of the corporation's soliciting agent were merely the expression of an opinion as to the probable location and completion of the road; yet, if the agent further represented that the money subscribed would be refunded unless the road was so located and completed, and he was authorized to make these representations, the action will, *it seems*, be enjoined in equity, on proof of the insolvency of the corporation and its abandonment of the work before completion.

APPEAL from the Circuit Court of Crenshaw.

Tried before the Hon. H. D. CLAYTON.

This action was brought by the appellant, a domestic corporation, against Eli Matthews and M. T. Matthews; was commenced on the 14th February, 1883, and was founded on a writing signed by the defendants, which was in these words:

"Crenshaw County, Ala. July 26th, 1881. On the first day of December, 1882, we promise to deliver to the Montgomery Southern Railway Company two bales of middling cotton, of 500 lbs. each, at the Alabama Warehouse in the city of Montgomery, the proceeds of which is to be credited to our account, as payment upon two shares of the capital stock in said railway company subscribed by us; and in case we make default in the delivery of said cotton, or any part thereof, as above provided, then we hereby agree to pay to said Montgomery Railway Company, in money, the market price of such cotton in said city of Montgomery on said day; and to secure the faithful performance of this contract, we hereby waive all exemptions to which we are or may then be entitled under the laws or constitution of this State."

The complaint set out this instrument, averred the failure of the defendants to deliver the cotton as stipulated, whereby they became liable to pay the money as specified, and claimed the money, with interest. The defendants pleaded the general issue, and several special pleas, some of which alleged that the writing sued on was void for fraud, having been procured by

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the false representations of the plaintiff's agent. These representations were stated in the several pleas in these words: (3.) "Before the making and the execution of said note by these defendants, the said plaintiff's agent, who was M. L. Kirkpatrick, represented to these defendants that the said railroad, for stock in which the said note was given, would run near *his* land, within from one to two miles thereof, substantially along the 18th range line, and would be built within two years from the date of said note, to a point near Rutledge, and below the lands of these defendants; and defendants aver that more than two years have elapsed since the making of said note, and that plaintiff has not built or run said railroad near the land or place of business of these defendants; nor has said road been built to a point near Rutledge, and below the lands of these defendants; and said representations were false and fraudulent, and without these representations they would not have given said note." (4.) "Said note is void of fraud, in this: That at and before the execution of said note by these defendants, M. L. Kirkpatrick, who was the plaintiff's agent, represented to these defendants that said railroad would be built to Rutledge, or within three miles of Rutledge, within two years at furthest from the date of said note; and defendants aver that, believing said representations to be true, and relying on the same, they made and executed said note," &c.; with the additional averment that said road was not so built, and said representations were fraudulent. (5.) "That said note was procured by the false and fraudulent representations of M. L. Kirkpatrick, who was at the time the plaintiff's agent in procuring subscriptions to the capital stock of said corporation, in this: Said Kirkpatrick represented to these defendants, before they signed said note, that said railroad would be built to Rutledge, or within three miles of Rutledge, in said county of Crenshaw, within two years at furthest from the date of said note, and would be built on, or substantially on the 18th range line, and that said road would run near the lands of these defendants;" which representations, it was further averred, were false and fraudulent, but were believed by defendants to be true. The 6th, 7th, 8th and 9th pleas set up a failure of consideration; alleging, in varying phraseology, that the consideration was the location and completion of the road according to the representations of plaintiff's said agent, and that the road had not been so located and completed.

The plaintiff demurred to these special pleas, assigning numerous grounds of demurrer to each: to the 3d, nine; to the 4th and 5th, twenty-nine; and to the 6th, 7th, 8th and 9th, the same as to all the former. One of the causes of demurrer specially assigned to each plea was, "that the representations

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set up as a bar to plaintiff's right to recover were mere matters of opinion of said agent." The court overruled the demurrers, on all of the grounds specially assigned, and issue was joined on all of the pleas.

On the trial, as appears from the bill of exceptions, the defendants thus testified in their own behalf: "At the time said obligation now sued on was executed by them, they met said Kirkpatrick (who, it was proved, was plaintiff's agent to solicit subscriptions to the capital stock of said corporation), in the public road, and he began to solicit subscriptions from them for said road. Defendants declined to take any stock, and said that they did not care for a road over in the mud in Montgomery county; that they did not want to go through the mud a part of the way, and did not feel able to pay for others to enjoy the road; but that they were willing to subscribe for stock, upon the condition that they were not to pay anything until the road was built to Rocky Mount, or the county line between Montgomery and Crenshaw counties. Kirkpatrick then stated, that he was satisfied the road would be built to Rocky Mount within a short time, and would be built to Rutledge, or within three miles of Rutledge, within eighteen months, or two years; that the way to get the road was to put all the little sums together, and let the president and officers of the road see that we wanted it, and it would be built; that he knew Dr. LeGrand and *Uncle Joe*, and the road would be built. Defendants then stated, that they wanted the condition inserted in the contract, that they were not to pay anything until the road reached Rocky Mount; and Kirkpatrick replied, that the road would be built to, or within a mile of Rocky Mount, by the time the note fell due, and would be built to Rutledge, or near there, within eighteen months, or two years; that if it was not built to Rutledge, or near there, the people in Crenshaw county who subscribed should have their money back; and that the road would be built along the 18th range line, which was within a mile or two of their lands. Kirkpatrick also pulled out a large bundle of contracts for stock, named several parties who had taken stock, and said that he wanted to carry up all the contracts alike, and it would make no difference if the condition was not inserted, as the note or contract would be void if the road was not built to Rocky Mount by its maturity. Upon this condition, and these representations, defendants said that they would take the stock and give their notes; and Kirkpatrick thereupon filled out the notes, and defendants signed them without reading or hearing them read over. *Without the statement and representation that the road would be built to Rocky Mount by the maturity of the note, or it would be void, and that the road would be built to Rutledge, or within three miles of Rutledge, within*

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eighteen months, or two years at furthest, defendants would not have signed or given said note." The plaintiff objected to the admission of the statement shown by the words italicized, and excepted to the overruling of their objection.

"The defendants were allowed to prove, also, by several witnesses, against the objection and exception of the plaintiff, that they were, each of them, subscribers to the capital stock of said plaintiff corporation, and made their subscriptions to said M. L. Kirkpatrick, as plaintiff's agent, a short time before the date of said note sued on; and that said Kirkpatrick represented and stated to each of them that said road would be built to Rutledge, or within three miles of Rutledge, within eighteen months, or two years at furthest, from the giving of their several notes, and that the money paid by them would be refunded, if it was not so built." To the admission of this evidence an exception was duly reserved by the plaintiff.

"Said Kirkpatrick testified for plaintiff, in rebuttal, substantially, that he was plaintiff's agent in soliciting subscriptions to its capital stock; that he at no time represented, as a fact, that the road would be built to any particular point, or upon any particular line; that he did not represent to the defendants that it would be built to Rocky Mount, but did express to them his opinion that it would be built to Rutledge at some time, but did not say any particular time, and did not tell them that he would defend them against said note if not so built; also, that at the time he took defendants' said note, or obligation, he had authority from the company to state that, if said road was not built to Rutledge, the money would be refunded to the people of Crenshaw county. He further testified, also, that the road was built only to 'Bell's Store' in Montgomery, about eleven miles from Rocky Mount; that it had not been located at all beyond said store, and the money had all given out; that plaintiff had ceased to work on the road in June, or July, 1882, and there was no prospect of the road going beyond said store; that the subscriptions in Crenshaw county amounted to about \$18,000, and, if all collected, would not extend the road three miles."

The court charged the jury, at the request of defendants—

1. "If the jury believe, from the evidence, that Kirkpatrick, as plaintiff's agent, stated and represented to the defendants as a fact, before the making of the note sued on, that the road would be built to Rutledge, or within three miles of Rutledge, within eighteen months, or two years at furthest from the making of said note; and that the road has not been built to Rutledge, nor within three miles of Rutledge, within the time stated, but has only been built to 'Bell's Store' in Montgomery county, about twenty-five miles from Rutledge; and

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that plaintiff has done nothing whatever since June, or July, 1882, to extend or build said road further; and that without this representation so made, defendants would not have given or executed the note sued on,—then the jury may find for the defendants”

2. “If the jury believe, from the evidence, that Kirkpatrick, as plaintiff’s agent, represented to defendants as a fact, at the time the note sued on was given, that the railroad would be built to Rocky Mount by or before the maturity of the note; and that said note was given upon the condition, that it was not to be paid, and would be void, unless the road was built to Rocky Mount by the maturity of said note on December 1st, 1882; and that said road has never been built to Rocky Mount, and plaintiff has done nothing since June, or July, 1882, and is doing nothing to build said road beyond ‘Bell’s Store,’ eleven or twelve miles from Rocky Mount towards Montgomery; and further, that these representations were false, and that the defendants, without these representations and conditions, would not have given the note sued on,—then they should find for the defendants.”

3. “No one can hold an interest procured for him by the fraud of another, any more than if the fraud was committed by himself. And if the jury believe, from the evidence, that Kirkpatrick, at the time he solicited and took the note sued on, was plaintiff’s agent for that purpose, and was sent out by plaintiff to solicit subscriptions for stock and take notes therefor, without any limitations as to his authority or power to make representations such as are set out in the pleadings in this case; and that he did make the representations charged as true and facts, and they were false and fraudulent, and induced defendants to make and give the contract now sued on; and plaintiff is here seeking to enforce the contract thus procured by the false and fraudulent representations of plaintiff’s said agent, if they so believe, the consequences of such false and fraudulent representations can not be avoided by plaintiff, when they are set up to [defeat] the contract sued on.”

The plaintiff excepted to these and other charges given by the court, and requested the following charges in writing: (1.) “If the jury believe, from the evidence, that said Kirkpatrick made representations of facts to the defendants, which induced them to subscribe to the capital stock of said railroad company, and the facts as represented were of matters which were as open to the inquiry of the defendants as of said Kirkpatrick; then the defendants can not avail themselves of the representations so made, as a defense to this suit.” (2.) “If the jury find, from the evidence, that Kirkpatrick made representations of facts as are set out in the defendants’ pleas in this

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case, which were an inducement to them to sign the note sued on; then it was the duty of the defendants to exercise reasonable diligence to ascertain their truth or falsity, and if they failed to do so, they can not set up the falsity of such representations in bar of the plaintiff's action." The court refused each of these charges, and the plaintiff excepted to their refusal.

The several rulings of the court on the pleadings and evidence, the charges given, and the refusal of the charges asked, are now assigned as error.

JNO. D. GARDNER (and with him SAYRE & GRAVES), for the appellant.—(1.) Representations made by plaintiff's agent to third persons, not in the presence of the defendants, could not have influenced their conduct, and ought not to have been admitted as evidence. (2.) The contract sued on is dated July 26th, 1881, and payable on a day certain, much less than two years from its date. All prior or contemporaneous agreements or stipulations are merged in the writing, and proof of conditions not incorporated in it can not be received to vary or defeat it.—*Railroad Co. v. Cross*, 20 Ark. 443; *Railroad Co. v. Posey*, 12 Ind. 363; *Eakright v. Railroad Co.*, 13 Ind. 404. (3.) The statements of Kirkpatrick, as alleged in the special pleas, and as proved, were merely the expression of opinions as to future matters, which were equally open to the knowledge and inquiry of the defendants, and could not constitute a fraud in law.—Price on Railroads, 61-2; Morawetz on Corporations, § 269; *Chamberlain v. Railroad Co.*, 15 Ohio, 225; 14 Amer. Law Review, 203.

JOHN GAMELE, *contra*.—(1.) The declarations and representations of the plaintiff's agent, while soliciting subscriptions for stock, by which defendants were induced to execute the writing sued on, were admissible evidence for them.—*Rices v. Plank-Road Co.*, 30 Ala. 100. (2.) Such representations, being material and false, are a complete defense to the action; for it is well settled, that no one can hold an interest procured for him by the fraud of another, any more than if the fraud was committed by himself.—*Atwood's Adm'r v. Wright*, 29 Ala. 346; *Rices v. Plank-Road Co.*, 30 Ala. 92; *Bowers v. Johnson*, 10 Sm. & Mar. 169; *Huguenin v. Basely*, 2 White & Tudor's L. C. Eq. 64; 32 Miss. 378; 20 Vt. 509; 7 Ired. Eq. 7; 3 Ired. Eq. 219. (3.) Oral proof of these representations may be received, on the ground of fraud, without impugning the rule which forbids the admission of oral evidence to vary or contradict a writing.—*Munroe v. Pritchett*, 16 Ala. 785, and 22 Ala. 501; *Railroad Co. v. Tipton*, 5 Ala. 787; *Canal Co.*

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v. Hathaway, 8 Wendell, 483; 3 Hill, 552; 6 Monroe, 248; Redf. Railways, § 48; *Henderson v. Railway Co.*, 17 Texas, 560; *Exchange Co. v. De Wolf*, 31 N. Y. 273; 87 Penn. St. 92; 83 Penn. St. 244; 9 Amer. Dec. 101. (4.) That Kirkpatrick's similar representations to other persons in the neighborhood were properly admitted as evidence, see Bigelow on Fraud, 478-9; *Lovell v. Briggs*, 2 N. H. 218; *Whittier v. Varney*, 10 N. H. 291; 11 Wendell, 83; 16 Maine, 465; 120 Mass. 444.

STONE, C. J.—In *Rives v. Montgomery South Plank-Road Co.*, 30 Ala. 92, the suit was on a subscription to the capital stock of the plank-road company. The defense was fraud in procuring the subscription. On the trial, "the defendant offered to prove that, before he subscribed for any stock in said company, and before its organization under its charter, two of its subscribers for stock, one of whom was afterwards elected president, and the other secretary of the corporation, represented to him that the road would be so located as to pass through his plantation, thereby greatly enhancing the value of his lands; that these representations were repeated by them after their election to their respective offices; and thereupon defendant subscribed for five shares of the capital stock of said company; and that said road, as afterwards located, did not pass within five miles of defendant's plantation." This testimony was rejected by the court, on plaintiff's motion; and the propriety of that ruling was the sole question presented in this court. In passing on that question, the majority of this court said: "We can not doubt that the declarations of those officers, as offered by the defendant, were relevant and admissible. Those declarations certainly throw some light upon one of the material questions in the case; and to exclude them is to deny, practically, to the defendant the right to prove the very basis on which he rests his defense. Until these declarations are proved, it is impossible to show that they were false, or that they formed an inducement to the defendant to subscribe." It will be observed that, in the case above, we did not decide that the representation, even if not kept and conformed to as a promise, was in itself sufficient to avoid the subscription. That question was not before us. We simply held that it was legal evidence—a predicate for further testimony.

An opinion expressed, even if not realized, can not, without more, become a fraudulent representation.—2 Brick. Dig. 14, §§ 16, 21; *Luke v. Security Loan Asso.*, 72 Ala. 207. If, however, such opinion is falsely expressed, with intent to deceive, and does deceive, this constitutes such opinion or representation a false statement of fact, and vitiates a contract

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thereby procured, unless the representation relates to a matter equally open to both parties. This could not deceive.

In *Pierce on Railroads*, 61, it is said: "This defense [fraud in procuring a subscription] is usually founded in statements known to be false by its official managers, and made by them, or by agents in their behalf, concerning the financial condition and earnings of the company, the amount subscribed, or other material facts calculated to tempt subscribers. They may be made by officers and agents directly to subscribers, or through a prospectus issued by the company to the public, for the purpose of obtaining subscriptions. . . . Equity will set aside a subscription when procured by fraud." And on page 62 it is said: "The subscriber can not defend on the ground of fraud, . . . where it declared only opinions instead of facts, or where it declared facts of which the subscriber had means of knowledge." The same doctrine is expressed in *Morawetz on Corp.* § 309, and in 1 *Redf. on Railways*, 5th ed. 172-3. See, also, 14 *Amer. Law Review*, 192-3; *Franklin Glass Co. v. Alexander*, 9 *Amer. Dec.* 92, Note, 102; *Miss., Ouachita & Red River R. R. Co. v. Cross*, 20 *Ark.* 443; *Evansville, Ind. & C. S. L. R. R. Co. v. Posey*, 12 *Ind.* 363; *Smith v. R. River Co.*, 2 *L. R. Eq. Cas.* 262; *Water Valley Man. Co. v. Seaman*, 53 *Miss.* 655; *Hanover Junction R. R. Co. v. Haldeman*, 82 *Penn. St.* 36; *Crump v. U. S. Min. Co.*, 7 *Grat.* 352.

In Pennsylvania, the rule that parol testimony can not be received to vary the terms of a written contract does not prevail; and, hence, in that State the rulings are somewhat different.—*Caley v. Phil. & Chester Co. R. R. Co.*, 80 *Penn. St.* 363; *Kostenbader v. Peters*, *Ib.* 438; *Lippincott v. Whitman*, 83 *Penn. St.* 244. That rule does not prevail with us. *Henderson v. Railroad Co.*, 17 *Tex.* 560, is, perhaps, the strongest authority that can be found in favor of appellee's views. We are not inclined to go so far.

There can be no question, that if the stock subscription in this case was procured by the fraud of Kirkpatrick, the soliciting agent, the railroad corporation, claiming the benefit of the subscription, must take it tainted with Kirkpatrick's fraud. *Story on Agency*, § 253; *Corning v. Southland*, 3 *Hill, N. Y.* 552; *Mead v. Bunn*, 32 *N. Y.* 275; *Harris v. Delamar*, 3 *Ired. Eq.* 219; *Meadows v. Smith*, 7 *Ired. Eq.* 7.

There are cases of fraud, and other unlawful acts, particularly when acts of the same general character are continuous in their nature, where it is permissible to prove other similar transactions occurring about the same time, as shedding some light on the transaction in controversy.—*Bigelow on Fraud*, 478; *Bentham v. Cary*, 11 *Wend.* 83; *Aldrich v. Warren*, 16 *Me.* 465; *Lovell v. Briggs*, 2 *N. H.* 218; *Whittier v. Varney*, 10 *N. H.*

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291; *Blodgett v. Morrill*, 20 Verm. 509. The present case does not fall within this rule.

There is another class of cases, where a statement is made as of fact, and, relying on its truth, a purchase is made on the strength of it, but it turns out to be untrue. Now, if the erroneous statement was as to a matter of substance, and operated as an inducement to the purchase, then it furnishes ground for defending against the purchase, even though the seller honestly believed the facts existed as he represented them to be. This principle rests, not on the doctrine of fraud, but on the ground that the purchaser failed to get what he bargained for, and failed because of the erroneous statement of fact made by the vendor, which he trusted, and had a right to trust. *Munroe v. Pritchett*, 13 Ala. 785, and, to some extent, *Atwood v. Wright*, 29 Ala. 346, illustrate this principle. It can not apply, however, where the representation consists in opinion. That, to be the basis of a legal right, in any case, must be knowingly false, and uttered with intent to deceive. A positive statement, made in the sale of a tract of land, that the line runs at a designated place, if acted on, and turns out to be untrue, misleads the purchaser. If the lands obtained are less valuable than the lands pointed out, he is deceived, and consequently is armed with an appropriate remedy to secure his indemnification. If, however, the representation be made as matter of opinion only, then, to obtain any relief, the purchaser must show that the representation was made knowing its falsehood. Less than an intentional deception, in such conditions, gives no right of action.

One of the grounds of demurrer to all the special pleas is, "that the representations set up as a bar to plaintiff's right to recover were mere matters of opinion of said agent." There are many other grounds, questioning the sufficiency of the pleas in almost every particular. The representations set forth in each of the special pleas relate to matters afterwards to be performed, and could be nothing but opinion. These pleas are fatally bad, because they do not aver that Kirkpatrick did not honestly entertain the opinions he expressed, and the proof on this question is no better than the pleading. The demurrers to the special pleas ought to have been sustained.

Under the principles declared above, many rulings of the court in admitting testimony, and in charges given, were erroneous. We will not particularize, believing, as we do, that what is stated above will furnish a sufficient guide on another trial.

There is a possible phase of this case not covered by what is said above, nor sufficiently averred in the pleadings. Kirkpatrick testified, that he was authorized by the directors to

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agree with the subscribers to stock living in Crenshaw county, that their money should be refunded to them, if the railroad was not built to a point at or near Rutledge. He did not in terms say he gave such promise. He also testified, that the money was exhausted, and work on the road had progressed only to "Bell's Store," and had long been discontinued. The record fails to show what is the present *status* of the corporation, whether or not it is insolvent, or in active existence, and whether or not it has the means of carrying the road to Rutledge. If the corporation is bankrupt, or has no means of ever constructing the road to Rutledge, it would seem to be a bootless performance, to force the Crenshaw stockholders to pay their subscriptions, to be immediately refunded to them; and if the corporation be insolvent, without power or purpose to complete the road to Rutledge, perhaps it may be defeated and restrained in its attempt to coerce collections, at an expense that might be appalling. We merely throw out these suggestions in the interest of justice and economy. The law takes no pleasure in useless litigation.

Reversed and remanded.

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Statutory Detinue for Personal Property.

1. *Application of payments.*—When a debtor owes several distinct debts to one creditor, and makes a general payment, not directing how it shall be applied, the creditor may apply it as he pleases, and notice of the application to the debtor is not necessary; but the creditor must exercise this right *ante litem motam*, or before any controversy about it has arisen.

2. *Same.*—When an application of the payment has been once rightfully made, it can not be changed without the consent of both parties; and when it is made by the creditor, he having the right of election, it becomes irrevocable by him alone when he communicates the fact to the debtor.

3. *Application of proceeds of sale of mortgaged property.*—When mortgaged property is sold under the mortgage, the mortgagee must apply the proceeds of sale to the payment of the mortgage debt, without any special directions from the mortgagor; and he can not apply the money to another debt, without the consent of the mortgagor.

APPEAL from the Circuit Court of Barbour.

Tried before the Hon. H. D. CLAYTON.

This action was brought by Lucius Johnson, against John Thomas, to recover "one bay horse colt named *Charley*, with

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value of hire or use thereof from 2d January, 1883;" and was commenced in a justice's court, on 5th February, 1883. The case being removed to the Circuit Court by appeal, a bill of exceptions was there reserved by the plaintiff, as follows: "By consent, N. W. Long was substituted as defendant, instead of John Thomas; and the following facts were agreed on: The horse sued for was, in 1880, while a small colt, given verbally to plaintiff by his father, Dock Johnson, with whom plaintiff was then living; and there was no change in the actual possession of the horse, until it was taken by defendant from said Dock Johnson. At the time of said verbal gift, and ever since, said Dock Johnson has not had sufficient property to pay the indebtedness hereinafter stated. On March 27th, 1879, being indebted to said N. W. Long in the sum of \$300 then due, Dock Johnson gave said Long his note for \$300, with interest from date, due November 1st, 1879, and secured the same by mortgage on his crop, and upon one mare, then in foal; and the horse colt sued for was dropped by said mare in 1880. During the year 1879, Long sold goods to Dock Johnson, on open account, to the amount of \$157.25; and he obtained from said Johnson in 1879 cotton amounting to \$80.58 and \$156.51 (\$237.09), part of the crop embraced in said mortgage. Without the consent or direction of said Johnson, and without consulting him, Long applied the proceeds of said cotton as follows: \$157.25 to the open account of 1879, and the balance (\$70.74) to the note secured by the mortgage. During the year 1880, Long sold to said Johnson, on open account, goods to the amount of \$65.31; and he received of Johnson's crop that year, on the 1st November, 1880, cotton of the value of \$111.58, and on December 22d to the value of \$37.17; which sums he applied, without the direction of Johnson, and without consultation with him, as follows: \$65.31 to the open account of that year, and the balance (\$83.44) to the mortgage note of 1879. Matters stood in this way until early in 1883, when said Long, by Thomas as his agent, took possession of the mare and colt under his mortgage, and sold the mare, on March 14th, for \$24. On the trial of the case in the justice's court, the issue being whether the mortgage was paid, Long exhibited his accounts with Dock Johnson, showing amounts and application of payments as herein stated; and he was notified on said trial, by plaintiff, and by Dock Johnson, and by one Daniel, who held a mortgage upon the colt, that he must apply the entire proceeds of the cotton received of the crop of 1879 to the debt secured by the mortgage; and Dock Johnson, being present, notified him that the application of the proceeds of the crop of 1880, as shown, was satisfactory to him, and he would not permit or consent to any change in the application thereof.

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On the trial in the Circuit Court, the issue being whether the mortgage was paid, said Long exhibited his statement of accounts with Dock Johnson, showing that he had, in accordance with instructions of said Johnson, and of said Daniel, the subsequent mortgagee, applied the whole of the proceeds of the cotton of 1879 (\$237.09) to the mortgage debt, and had transferred, as he presumed he had the right to do, the credit of \$83.44, proceeds of the cotton received in 1880, from the mortgage debt of 1879, to the open account of 1879."

"On these facts," the court charged the jury, at the request of the defendant, as follows: (1.) "That Long had the right to change the application of the \$83.44, from the mortgage debt to the open account of 1879, notwithstanding the notice not to do so, and against the objection to his doing it." (2.) "On the evidence, the jury must find for the defendant." The plaintiff excepted to each of these charges, and requested the following charge in writing: "Long, by entering as a credit the amount of \$83.44, of the crop of 1880, on the mortgage debt, thereby applied the same, *pro tanto*, to its satisfaction, and he could not afterwards transfer it; and in determining whether the mortgage was satisfied, the jury must credit it with the amount of the proceeds of the crop of 1879 received by Long, the sum of \$83.44 of the crop of 1880, and the \$24 received by the sale of the mare." The court refused to give this charge, and the plaintiff excepted to its refusal.

The charges given, and the refusal of the charge asked, are now assigned as error.

J. M. WHITE, and C. P. S. DANIEL, for appellant.

McKLERoy & COMER, *contra*.

SOMERVILLE, J.—Where a debtor, who owes another several distinct debts, makes a payment to him, without directing the mode of its appropriation, the creditor may apply the money as he pleases. This he may do, without giving the debtor any notice of the act by which the appropriation has been made. But the right must be exercised *ante litem motam*, or before any controversy has arisen between the parties as to the act. It is too late to attempt it after such disputation, and *a fortiori* at the time of the trial.—1 Addison on Contr. § 350; *Callahan v. Boazman*, 21 Ala. 246.

It may be considered as settled, moreover, that where a payment has been rightfully ascribed or appropriated to one of several debts, it requires the consent of both parties to change it.—1 Greenl. Ev. § 532 *a*. And the act may be considered complete, and irrevocable by the creditor alone, when, having

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the right of election, he has exercised it, and communicated the fact to the debtor.—2 Whart. Contr. § 932; 1 Addison on Contr. § 350; 2 Parsons Contr. (6th ed.), 630.

The debtor unquestionably had a right to have the proceeds of sale of the mortgaged property appropriated to the satisfaction of the mortgage debt, without any special direction to this effect. This duty of the creditor is one implied by law, in the absence of the debtor's consent to have the money credited upon some other debt.—*Levystein v. Whitman*, 59 Ala. 345; *Sanders v. Knox*, 57 Ala. 80; 2 Whart. Contr. §§ 924, 929.

The proceeds of the cotton subject to the mortgage, and shown to have been received by the mortgagee, Long, is about the sum of two hundred and thirty-seven dollars. This must be credited on the mortgage debt. The only other item in controversy is that of eighty-three 44-100 dollars, received from the crop of 1880. The creditor, Long, having elected to appropriate this money to the payment of the mortgage debt, and this fact having been communicated to the debtor, Johnson, upon occasion of the trial in the justice's court, the former had no power to change it, when the cause was on trial in the Circuit Court on appeal.

If the mortgage debt was fully paid, the plaintiff, of course, was not entitled to recover.

The rulings of the Circuit Court were opposed to this view, as shown in giving the first and second charges requested by the defendant. The charge numbered three, requested by the plaintiff, was properly refused, because of the last clause. Long was under no duty to appropriate the twenty-four dollars received from the sale of the mare, to the payment of either debt due him by Johnson. If the mortgage debt was paid as the evidence shows, he had no right to sell the mortgaged property, and did not in fact convey any title at the sale. He may have been liable for the proceeds of sale to the purchaser, but not to the mortgagor—the latter not being able to claim both the property and the proceeds of it. He can not claim under the sale, and against it.

Reversed and remanded.

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Knight v. Drane.

Bill in Equity by Mortgagor, to enjoin Sale under Mortgage, and to establish Equitable Set-off.

1. *Set-off in equity against mortgage debt.*—When the mortgagee files a bill to foreclose, the mortgagor may set up any defense, except the statute of limitations, which would be available at law in an action on the debt; and hence he may, in extinguishment or reduction of the mortgage debt, set off any other debt or demand which would be available at law; but, when the bill is filed by the mortgagor himself, seeking to enjoin a sale of the property under a power in the mortgage, he must show some other ground for equitable interference, before he can establish as a set-off an independent debt or demand, for which he has an adequate remedy at law.

APPEAL from the Chancery Court of Lowndes.

Heard before the HON. JOHN A. FOSTER.

The bill in this case was filed on the 20th June, 1884, by C. W. Knight, against W. W. Drane, as the administrator of the estate of Mrs. Mary A. Harrell, deceased; and sought to enjoin a sale of certain lands, under a power contained in a mortgage, and to establish a set-off against the mortgage debt. The mortgage, a copy of which was made an exhibit to the bill, was dated September 8th, 1853, and conveyed an undivided one-sixth interest in a large tract of land; and it was given to secure the payment of two notes executed by the complainant, for \$500 each, of even date with the mortgage, in part payment of the price at which he had become the purchaser at a sale made by the defendant as administrator. The sale was made under an order and decree of the Probate Court, was reported to that court by the administrator, and duly confirmed; one half of the purchase-money having been paid in cash, pursuant to the terms of the order of sale. The tract of land had belonged to Jesse B. Knight, deceased, who was the father of Mrs. Harrell and of the complainant, and who died in September, 1868. Letters of administration on the estate of Jesse B. Knight were duly granted, soon after his death, to the complainant in this suit; and in January, 1879, said administrator sold said lands under an order of the Probate Court. At that sale, the six children and heirs, including C. W. Knight and Mrs. Harrell, became the purchasers, at the price of \$10,509; one third of which amount was paid in cash, and for the balance (\$7,206) they executed their joint note, payable to said C. W. Knight as admin-

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istrator, a copy of which was made an exhibit to the bill. In January, 1880, the complainant made a final settlement of his administration on the estate of said Jesse B. Knight; and on that settlement, a decree was rendered in his favor against Mrs. Harrell, for \$194.69. Mrs. Harrell died in September, 1882, and letters of administration on her estate were granted to the defendant more than eighteen months before the bill was filed. The bill alleged, that Mrs. Harrell was indebted to the complainant, on account of the unpaid balance for her proportionate share of said joint note, in the sum of \$221.73, and also for the amount of said decree against her; that he had presented these claims, duly verified by affidavit, to the defendant as administrator, within eighteen months after the grant of his letters of administration, and had asked an allowance of them as credits on the mortgage debt, tendering and offering to pay the balance; that the defendant refused the offer and tender, and had advertised the lands for sale under the mortgage; that Mrs. Harrell's estate was "amply solvent," and that more than eighteen months had elapsed since the grant of administration to the defendant; and the complainant offered in his bill, if his said tender was in any wise informal or insufficient, to pay into court whatever sum might be justly due on said mortgage, after deducting the amount due on said two claims held by him against Mrs. Harrell's estate. On these facts, as alleged in the bill, and shown by the exhibits, the complainant prayed an injunction of the sale under the power in the mortgage, an account of the mortgage debt, a cancellation of the mortgage, and general relief.

The chancellor dismissed the bill, on motion and on demurrer, for want of equity; and his decree is now assigned as error.

GAMBLE & RICHARDSON, for the appellant.—The bill contains equity, as a bill to redeem after default, alleging a tender and refusal, and offering to pay whatever may be found due. *Davis v. Hubbard*, 38 Ala. 185; *Smith v. Quartz Mining Co.*, 14 Cal. 242; 1 Jones on Mortgages, §§ 673-4; 2 *Ib.* §§ 886, 888, 892. This relief may be granted under the general prayer, though there may be no technical prayer for a redemption; and any amendable defects in the bill are to be regarded as amended, on motion to dismiss for want of equity.—*Nelson v. Dunn*, 15 Ala. 501; *Railroad Co. v. Kenney*, 39 Ala. 307; *Jones v. Ewing*, 56 Ala. 362. As to the sufficiency of the tender, see 2 Jones on Mortgages, § 894; *McGuire v. Van Pelt*, 56 Ala. 350; *Rogers v. Torbut*, 58 Ala. 525; 18 Johns. 580. Taking jurisdiction of the case as a bill to redeem, the court will go on and do complete justice by allowing the complainant's set-off against

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the mortgage debt, although it might not entertain the bill if filed for that purpose alone.—*Stow v. Bozeman*, 29 Ala. 397; *Scruggs v. Driver*, 31 Ala. 274; *Stewart v. Stewart*, 31 Ala. 207; *Ware v. Russell*, 70 Ala. 74. That the complainant's demands are a proper set-off, see *Brazier v. Fortune*, 10 Ala. 516; 2 Jones on Mortgages, §§ 1496-97; 26 Ala. 326; 2 Ala. 343. The bill contains equity, also, to prevent a multiplicity of suits, and to restrain the mortgagee from making an oppressive use of his mortgage.—*Struve v. Childs*, 63 Ala. 473.

BRAGG & COOK, *contra*, cited 7 Wait's Actions & Defenses, 504, § 22; 2 Brick. Digest, 431, § 131; *Gayle v. Randle*, 1 Stew. 529; *Rapier v. Holland*, Minor, 176.

CLOPTON, J.—We concur with the chancellor, that the bill is without equity. The right of the mortgagor to set off the mortgage debt by a debt or demand due him by the mortgagee, in equity, depends, in some cases, on which party resorts to equity. When the mortgagee brings a bill in equity for the foreclosure of the mortgage, the mortgagor may set up any defense, other than the statute of limitations, which would avail in an action at law on the debt, and hence may, in reduction or extinguishment of the mortgage debt, set off any debt or demand that would be available at law. It is, however, well settled, that when it becomes necessary for the mortgagor to resort to equity, to obtain the benefit of a set-off, he must allege and show some other ground of equitable interposition, than the mere existence of a legal demand, which is the proper subject of set-off under the statute.—*Gafford v. Proskauer*, 59 Ala. 264.

The proceeding by the mortgagee, to foreclose under the power of sale, rendered it necessary for the mortgagor to resort to equity to obtain the allowance of the set-off. The demands which he proposes to set off are purely legal, and the estate of Mrs. Harrell is shown to be amply solvent. The bill does not allege the insolvency of the administrator or his sureties, or any agreement that the demands should be applied in abatement of the mortgage debt, or any facts showing that his remedy at law is, in any respect, complicated, embarrassed, or inadequate; and without an agreement, or some equitable ground, the law does not apply the set-off in payment of the mortgage debt. The tender to the mortgagee, having been declined by him, is insufficient; and the allegation of great damage is unsupported by any facts. The bill fails to show any ground of equitable relief.

Affirmed.

Tamplin v. Still's Adm'r.

Action for Money Had and Received under Deposit or Loan.

1. *Sunday contracts; loan or deposit of money.*—A loan of money on Sunday is void as a contract, unless brought within some one of the statutory exceptions (Code, § 2138); but, when money is deposited on that day, not for use, but for safe-keeping, the liability of the person receiving it dates only from his subsequent conversion, or his failure or refusal to return it on demand; and the depositor may waive the tort, and maintain an action for money had and received, although the deposit was made on Sunday.

2. *Declaration of party; admissibility as part of res gestæ.*—In an action to recover money alleged to have been deposited by plaintiff's intestate with defendant, for safe-keeping, a witness for plaintiff, who was present at the intestate's house at the time the deposit was alleged to have been made, and who then returned to him, on his request, the bag alleged to contain the money, further testified that he then went into an adjoining room with the defendant, carrying the bag in his hand, and they had a conversation which she did not hear; and that the intestate "soon after came into the room where she was, and told her he had let the defendant have the money to keep." Held, that this declaration, thus standing alone, was not admissible on the principle of *res gestæ*, it not being stated that the intestate returned without the bag.

3. *Entry in memorandum book by deceased person.*—An entry in a memorandum book kept by the plaintiff's intestate, and concerning which a conversation was had between plaintiff and defendant, though competent evidence as explaining the conversation, is not admissible as a memorandum made by the intestate, and can not be proved to be in his handwriting, when it does not appear that the handwriting was mentioned during the conversation.

APPEAL from the Circuit Court of Bullock.

Tried before the Hon. H. D. CLAYTON.

This action was brought by Mrs. Julia A. Still, as the administratrix of her deceased husband, Benjamin Still, against James Tamplin; and was commenced on the 21st November, 1881. The original complaint contained a count in trover for the alleged conversion by the defendant, on the 8th September, 1881, of \$1200 in gold, and a count for money and received; but the count in trover was struck out by amendment, after demurrer sustained for misjoinder, and a special count was added, which alleged a deposit of the money in gold by plaintiff's intestate with defendant, and the defendant's subsequent failure and refusal to return it to plaintiff on demand, never having restored it to the intestate while living, and never having been requested by him to restore it. The defendant pleaded the general issue, and a special plea, which averred

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that the money sued for "was loaned to defendant by plaintiff's intestate on a Sunday, without any necessity for lending it on that day;" and issue was joined on both of these pleas.

On the trial, as the bill of exceptions states, the plaintiff testified as a witness for herself, and stated that, "about six weeks after the death of her said intestate, who died in July, 1881, and on the morning of the day on which the appraisement of his estate was to be made, she was at the defendant's house, and sitting with him on his front porch, when he asked her, *What about the money said Still let him have to keep?*" and she replied, that she did not know; that she found a blank book, a short time afterwards, in the pocket of a coat which said Still had been wearing, and sent word to the defendant that she had found a book showing how much he had received from said Still; that the defendant came to her house a few days afterwards, called her out to the front gate, and asked to see the book, and she showed him a certain entry in it; that defendant said he did not know, but did not think it was so much, and did not think it was over \$800. Plaintiff then offered to prove, by said witness, that said entry was in the handwriting of said Still; and the court allowed the witness to so testify, against the objection and exception of the defendant. Said entry, as copied in the bill of exceptions, is dated "Sept. 18th, 1884" (?), and in these words: "*Let J. B. Tamplin have twelve hundred dollars to keep for me.*" The court permitted the entry to be read to the jury as evidence, "for the purpose of showing that plaintiff (witness) charged defendant with having received money from said Still in his life-time, and the amount thereof, and as explanatory of said conversation between plaintiff and defendant, and to supply what would otherwise make the remark of the witness incomplete; but stated to the jury, that said writing was not admitted for the purpose of showing that said Still let defendant have money, and was not evidence of that fact, and that they should only consider it as evidence of the amount she charged defendant with having received, and as though she had charged him with receiving that amount. The defendant excepted to the ruling of the court in admitting said entry as evidence for any purpose."

Mrs. Barnett, the plaintiff's mother, being examined as a witness for her, stated that, "in September, 1880, she was at the house of said Benjamin Still, and he had a bag about the size of a shot-bag, which contained something heavy, and which he asked her to keep for him; that he did not tell her what it contained, nor did she see its contents, but the bag was heavy; that she took the bag, and put it in a trunk, which she locked, hanging up the key in a room where she was waiting on plain-

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tiff, who was very sick; that on one Sunday morning, about three weeks afterwards, defendant came to the house, and went into the parlor; that said Still asked her for the key of the trunk, and asked her to get the bag for him; that she handed the bag to him, and he carried it into the room where the defendant was; that she heard them talking, but could not understand what they said; that soon after said Still came into the room where she was, *and told her that he had let the defendant have the money to keep.*" The defendant objected to this last statement of the witness, contained in the words italicized, and duly excepted to the overruling of his objection.

The defendant, testifying as a witness for himself, gave a different version of the conversations between the plaintiff and himself, and denied that he had ever received from the intestate any money for which he had not afterwards accounted; and he produced two receipts given to him by the intestate, which were dated respectively in January and April, 1881. The plaintiff, testifying in rebuttal, stated that these receipts related to other matters, and had no connection with the money sued for. Exceptions were reserved by the defendant to several rulings of the court relating to this evidence, but they have no bearing on the questions here decided.

This being all the evidence, "the court charged the jury of its own motion, among other things, that if they should find, from the evidence, that the money sued for was received by the defendant on a Sunday morning (if it was received by him at all), this was no defense to the action, and did not prevent the plaintiff from recovering." The defendant duly excepted to this charge, and requested the following (with other) charges, which were in writing:

"1. If the jury believe, from the evidence, that plaintiff's intestate let the defendant have money, to be kept and used by him, and to be returned by him, then this was a loan; and if such loan was made on Sunday, then the contract was void, unless the evidence shows that there was some necessity for said Still to let defendant have the money on that day."

"3. If the jury find, from the evidence, that plaintiff's intestate let the defendant have money, to be kept and used by the defendant, and to be returned by him, this was a loan; and if such loan was made on Sunday, then the contract was void, and plaintiff can not recover."

"4. If the jury believe, from the evidence, that Benjamin Still in his life-time let the defendant have money, to be kept and used by him, and to be returned by him to said Still, and if the evidence further shows that this was done on Sunday; then the plaintiff can not recover in this action for money had and received, if the evidence further shows that there was no

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necessity that said Still should have let the defendant have said money on that day."

"6. If the jury find, from the evidence, that said Benjamin Still in his life-time let defendant have money, to be kept and used by him, and to be returned by him to said Still when called for, then this was a loan; and if such loan was made on Sunday, then the contract was void, and plaintiff can not recover in this action for money had and received, unless the evidence furthers shows that there was some necessity that said Still should have let defendant have said money on that day."

The court refused each of these charges, and the defendant excepted to their refusal; and he now assigns their refusal as error, together with the charge given, the several rulings on evidence to which he reserved exceptions, and other matters which require no notice.

ARRINGTON & GRAHAM, for appellant.—(1.) The plaintiff ought not to have been allowed to testify to the handwriting of the entry in the memorandum book; because the entry itself was not competent evidence, and she was not a competent witness to prove the handwriting.—*Davis v. Tarrer*, 65 Ala. 98. (2.) The testimony of Mrs. Barnett to which exception was reserved, as to the declaration of her intestate, ought to have been excluded from the jury, because said declaration was no part of the *res gestæ*.—*Railroad Co. v. Hawk*, 72 Ala. 112. (3.) If the defendant's special plea was defective, a demurrer to it should have been interposed, and it can not be treated as presenting an immaterial issue.—*Mudge v. Treat*, 57 Ala. 1; *Farrow v. Andrews & Co.*, 69 Ala. 96. (4.) If the money was loaned on Sunday, the contract between the parties is void by statute, and no recovery can be had upon it.—Code, § 2138; *Meader v. White*, 66 Maine, 90; *Trociart v. Decker*, 51 Wisc. 46; *Meyers v. Meinrath*, 101 Mass. 366; *Gunderson v. Richardson*, 56 Iowa, 56; *Kenney v. McDermott*, 55 Iowa, 674; *Block v. McMurry*, 56 Miss. 215, or 31 Amer. Rep. 357.

NORMAN & SON, and W. D. WOOD, *contra*. (No brief on file.)

STONE, C. J.—The testimony given for plaintiff in this cause tends to show, that Benjamin Still deposited the little bag, with its contents, with Tamplin, the appellant. There is not the slightest testimony tending to show it was a loan. If it was a deposit, it was a deposit for safe-keeping, not for use; and if so deposited, the presumption is he retained it, and retained it unaltered, until the proof shows the contrary. There being no proof that Tamplin made any use of whatever was

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deposited with him, if any thing, his liability for its return will date from the time its return was demanded, and he refused or failed to return it. In such case, even if he received money on Sunday for safe-keeping, and kept it over till Monday, or a later day, and then used it, this would be a conversion, for which an action would lie.—*Flanagan v. Meyer*, 41 Ala. 132. And if he so received the package, and afterwards converted the contents, plaintiff could waive the tort, and sue in assumpsit for so much money had and received; and such waiver would only have the effect of converting the tort into a constructive contract, taking effect, as such, at the time of the conversion. If the case supposed above be the true facts of the transaction in controversy, then it was not such a contract made on Sunday, as falls within section 2138 of the Code of 1876. Under these principles, the Circuit Court committed no error in the charge given, nor in the refusals to charge as asked. We need scarcely add, if there had been any testimony that the transaction was a loan, then charges one, three, four and six, asked by defendant, ought to have been given.

2. Mrs. Barnett, witness for plaintiff, testified that, on a Sunday morning, Mr. Still, plaintiff's intestate, carried the bag, which it is claimed contained coin, into the parlor of his own dwelling, and there had an interview with Tamplin, the defendant. She heard the voices, but could not distinguish the words. She further testified, against the objection and exception of defendant; "that soon after, said Still came [returned] into the room where witness was, and told her that he had let the defendant have the money to keep." This testimony was offered and received as a *res gestæ* declaration. What was the transaction, or thing done, which this remark could tend to elucidate? The proof only informs us he returned to the room in which the witness was, after having had an interview with Tamplin in another room, and made the remark. If he went out, carrying the bag, and returned without it, and then immediately made the remark attributed to him, this would have been the expression of a natural impulse—an explanation of the fact that he returned without the bag, when he had recently before carried it out with him. Offered alone as it was, with no material fact in proof before the court which it could tend to elucidate, the Circuit Court erred in receiving it.—1 Greenl. Ev. § 108; *Ala. Great Southern R. R. Co. v. Hawk*, 72 Ala. 112.

3. The Circuit Court also erred in permitting plaintiff to testify that the entry in the little book was in the handwriting of her deceased husband. That entry was made testimony, only as tending to explain more fully the conversation plaintiff and defendant had held in regard to it. It is not shown that,

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in that interview, any thing was said in regard to the handwriting. It was admissible in evidence as part of a conversation; not as a memorandum made by intestate.

Other questions are raised, but there is nothing in them.
Reversed and remanded.

CLOFFOX, J., not sitting, having been of counsel.

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Statutory Real Action in nature of Ejectment.

1. *Contents of transcript; exhibits to bill of exceptions.*—Where the bill of exceptions directs the clerk to incorporate a document read in evidence, but the document itself is not set out, nor so described as to be properly identified, this court will not consider for any purpose a document copied in another part of the transcript, although the clerk states, in a memorandum preceding it, "The following pieces of evidence were mislaid at the time the above part of the transcript was made out, but have since been found, and are here copied as part of this record."

APPEAL from the Circuit Court of Coffee.

Tried before the Hon. H. D. CLAYTON.

This action was brought by Thomas Moore, against Melton Helms, to recover the possession of a tract of land, with damages for its detention. On motion of the defendant, the court dismissed the suit, on the ground of a submission to arbitration, and award against the plaintiff, as shown by the report of the case at a former term (74 Ala. 368), when the judgment was reversed, and the cause remanded. On the second trial, a bill of exceptions was reserved by the plaintiff, which is thus copied in the transcript: "The plaintiff introduced, as evidence of his title, the following certificate of purchase for the land sued for, by the register of the United States land-office. (*The clerk will here copy the certificate of the receiver, R. F. Cook, to plaintiff.*) The plaintiff proved that he was in the possession of the land sued for, at and before Sanderson entered the same, and continued in the actual possession of the same until about three years since, when he was dispossessed by the sheriff under a writ of possession issued on a judgment in favor of W. B. Halstead; and the plaintiff here rested his case. The defendant then introduced a certificate and patent to one Shepard F. Sanderson, for the land sued for, and a deed from the sheriff of Coffee county to W. B. Halstead; and proved the destruc-

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tion and contents of the judgment on which said execution issued, and the proceedings on which the same was founded; also, the execution against Sanderson, a deed to defendant by said Halstead, and the award of arbitrators made in a suit between plaintiff and said Halstead, wherein the said land was the subject of the suit, and the proceedings by which the said award was made the judgment of the court. (*The clerk will here copy each piece of evidence as heretofore mentioned, in the order in which they are mentioned.*)” The judgment entering up the award is here copied in the bill of exceptions, but the other documents mentioned are not set out; and the bill of exceptions then recites several objections to evidence, charges given and refused, and exceptions thereto. In a subsequent part of the transcript, after the final certificate, is a memorandum by the clerk in these words: “*The following pieces of evidence were mislaid at the time the above part of this transcript was made out, but have since been found, and are here copied as a part of this record;*” and one of the papers then set out is a receipt for \$10.45, signed “*Robert F. Cook, receiver,*” acknowledging the receipt of that sum paid by Thomas Moore, on the 1st September, 1856, into the “Receiver’s Office at Elba,” for the land involved in this suit. The opinion of this court renders it unnecessary to state the several rulings to which exceptions were reserved by the plaintiff, and which are here assigned by him as error.

J. E. P. FLOURNOY, W. D. WOOD, and N. W. GRIFFIN, for the appellant.

SOMERVILLE, J.—The bill of exceptions fails to set out any evidence of plaintiff’s title to the lands in controversy. We can not supplement this defect by reference to a paper copied by the clerk of the Circuit Court into another part of the record, purporting to be a certificate of entry signed by one who is styled a Receiver, without marks of reference or identification, by number, names, dates or otherwise. There is a failure to incorporate the paper in the bill, and it therefore forms no part of it.—*Pearce v. Clements*, 73 Ala. 256, and cases cited; *Parsons v. Woodward*, *Ib.* 348.

The plaintiff showing no title in himself, the general charge to find for the defendant was properly given.

We need not consider the other questions, but will observe that we are inclined to think there is no error in the record upon any of the assignments of error urged by the appellant.

Affirmed.

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Werborn v. Austin.

Bill in Equity by Remainder man, against Executor as Trustee, for Account and Settlement.

1. *Statutes omitted from Code.*—The act approved March 4th, 1876, entitled "An act to allow married women in certain cases to sue in their own names" (Sess. Acts 1875-6, p. 159), having been omitted from the Code of 1876, thereby became inoperative.

2. *Parties to bill; husband and wife.*—The 15th Rule of Chancery Practice, requiring bills by married women, in reference to their separate estates, to be filed in their names alone, without joining their husbands, fell with the statute on which it was founded, and which was abrogated by its omission from the Code of 1876; and since its abrogation, the husband must be joined with his wife as a complainant in a suit relating to her statutory estate.

3. *Will construed as conferring personal trusts on executors, which can not be exercised by one only.*—Where the testator devised his entire estate, real and personal, to his two executors as trustees, authorizing them to continue his mercantile business, at their discretion, for the benefit of his estate, with power to sell, buy, or re-invest, and to manage the business "upon their judgments, without any order of court," but after consultation with his widow; the income and profits, after payment of his debts, to be used for the support and maintenance of his widow and child or children as a family during her life, and on her death the property to vest absolutely in the children; *held*, that the will created personal trusts, which could not be executed by the sole executor who qualified.

4. *Executor and trustee acting without authority; bill for account and settlement.*—When a sole acting executor undertakes the management of the estate, and the execution of the personal trusts created and conferred by the will on both of the persons named as executors, although he acts without authority, he renders himself liable as a trustee; and he may be required to account in equity at the suit of the remainder-man.

APPEAL from the Chancery Court at Mobile.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 7th May, 1884, by Mrs. Adolph M. Austin, "a married woman, who is twenty-one years of age, and resides in Mobile county with her husband, H. L. Austin;" against Mrs. Amanda M. Pinney, who was her mother, and against George F. Werborn, who was the executor of the last will and testament of the complainant's deceased father, Adolph M. Solomon; and sought to compel an account and settlement by said Werborn of his management of said estate, both as executor and as trustee.

The said testator died in May, 1862, in the city of Mobile, where he resided; and his last will and testament was there duly proved and admitted to probate, soon after his death, and let-

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ters testamentary granted to said Werborn, one of the persons therein named as executors. The will, a copy of which was made an exhibit to the bill, contained the following provisions : (1). "I give, devise and bequeath the property I may now have, or which I may own at my death, whether real or personal, to my executors hereinafter named, to be held by them as trustees to carry out the provisions of this will. I empower them to carry on the mercantile business I may be engaged in at the time of my death, upon such terms, for such time, and in such manner as they may deem best for the interests of my estate, subject to the other provisions of this will; and they are also empowered not only to close the same when they think best, but also to sell, dispose of, re-invest and manage any part of the said interest, or any or all of my property, of any and every kind, upon their judgments, without any order of the court. In the conduct of said mercantile business, however, as well as in the closing of the same, and in the disposition, sale, re-investment and management of any portion of my property, my wife, Amanda M., must be consulted by my executors; and her consent to the action taken by them must be obtained in writing, and must be attested by at least one respectable witness. In case my wife and my executors can not agree as to the foregoing matters, the proper courts of the country must determine and order the course to be pursued by my executors, as most conducive to the interests of my estate." (2.) "After my just debts are paid, I give to my wife, Amanda M., the profits, use, enjoyment and income of all such property, of every kind, as I may leave at my death, for the support, maintenance and education of herself and children as a family; but my wife shall not dispose of any part of the same, in any way, nor subject it, as I give her no interest except in conjunction with the children aforesaid as a family. I especially charge my said wife to employ any such income or profits to the liberal maintenance and education of any child or children, or its or their descendants, as may have been or may be begotten of her by me; and the provisions as to the maintenance and support of any other child or children shall take effect only so long as such child or children may actually form a part of my said wife's family, and be dependent upon her." (3.) "At the death of my wife, I give, devise and bequeath the absolute ownership of my property, both real and personal, not consumed in the use aforesaid, to my child or children, or its or their descendants, that may have been or may be begotten of the said Amanda by me; but, in case she should leave no such child or children, or descendants as aforesaid of it or them, surviving her, then I bequeath any such remainder to any children or to any child of my said wife as may then be living." (4.) "I nominate, constitute and appoint

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my friend, George F. Werborn, and B. L. Tiner, of the city of Mobile, the executors of this, my last will and testament; and I invest them with all powers necessary and proper to execute this will and testament, and also empower them to compound, settle and arrange my debts, as they may think the interests of my estate may require. In testimony of which," &c.

The testator left an only child, then an infant of tender years, the complainant in this suit, who attained the age of twenty-one years within one year before the filing of the bill. Mrs. Amanda M., his widow, afterwards married again, and she was made a defendant to the bill. Werborn, the sole executor who qualified, undertook the administration of the estate, bought and sold property, and carried on the testator's business for many years; and the bill charged the commission by him of many acts of waste, negligence, and maladministration. In the year 1881, the executor was cited by the Probate Court, at the instance of Mrs. Pinney, to make a settlement of his accounts; and he thereupon appeared, and made a settlement of his administration, and a decree was then rendered against him, which was afterwards reversed by this court on appeal, at the instance of Mrs. Pinney.—*Werborn v. Pinney*, 72 Ala. 48-63, where the decree is set out in full. The bill alleged and charged that this decree was *res inter alios* as to complainant, because she was not represented by a guardian *ad litem*; and that it was void for want of jurisdiction, so far as it assumed to pass upon the acts of the executor as trustee. On these facts and allegations, the bill prayed that said Werborn be required to make a full settlement of his accounts and acts in the administration of the estate, that he be removed as executor and trustee, and that another person be appointed, if necessary, to carry out the trusts created by the will; and the general prayer, for other and further relief, was added.

A demurrer to the bill was filed by Werborn, assigning the following as grounds of demurrer: (1.) The bill is without equity, because it shows that the complainant is a married woman, and her husband is not a party. (2.) It is without equity, because it shows that Tiner, one of the persons named in the will as executor, refused to qualify, or to accept the trusts created by the will; whereby the discretionary powers vested by the will in said executors as trustees were annulled, and no trusts devolved upon said Werborn except such as were of a purely executorial nature; and because it shows that the complainant's mother, Mrs. Pinney, was her trustee under the provisions of the will, and was the only necessary party to said final settlement in the Probate Court. (3.) Because it shows that the discretionary powers vested by the will in the executors were annulled by said Tiner's refusal to accept the trust, and that no trusts de-

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volved upon said Werborn except such as were of a purely executorial nature; and because it shows that Mrs. Pinney was the complainant's trustee under the terms of the will, and was a necessary party to said final settlement; and therefore complainant shows no right to file this bill, to compel a final settlement by said Werborn as executor. (5.) Because it shows that this defendant is in no wise connected or interested in the trusts of the will, and has made a final settlement of his accounts as executor; and it is not shown that complainant's said trustee, Mrs. Pinney, was not a party to said final settlement, and it is not shown that complainant is entitled to file this bill to correct any error of law or fact in said settlement, "and said bill is altogether multifarious." (6.) Because it does not show that complainant's husband was not a party to said final settlement in the Probate Court.

The chancellor overruled the demurrer, on all the grounds assigned; and his decree is now assigned as error.

F. G. BROMBERG, for the appellant.

PILLANS, TORREY & HANAW, *contra*.

STONE, C. J.—Rule 15 of Chancery Practice was based on, and intended to carry into effect, the act "to allow married women, in certain cases, to sue in their own names," approved March 4, 1876.—Sess. Acts, 159. That act was omitted from the Code of 1876, and hence became inoperative; and the rule of practice fell with it.—*Sawyers v. Baker*, 72 Ala. 49. Mr. Austin ought to have been joined with his wife as a complainant, and the demurrer on that account ought to have been sustained.

There can be no question that the trusts created by Mr. Solomon's will were personal trusts confided to both of the persons named as executors, and that when Tiner refused to qualify and act, Werborn had not the power to perform the varied and delicate duties the will had created.—*Camp v. Coleman*, 36 Ala. 163; *Perkins v. Lewis*, 41 Ala. 649; *Anderson v. McGowan*, 42 Ala. 280; *Tarver v. Haines*, 55 Ala. 503; *Ex parte Dickson*, 64 Ala. 188. The bill, however, avers that Werborn did undertake to perform many of the functions of the trust, and it charges many acts of unauthorized administration. He has thereby, if these averments be true, rendered himself liable to be brought to account as trustee; and acting without authority, chancery will look after the trust fund, and place it in safe hands.—2 Williams on Ex'rs, by Perkins, 1506; 3 *Ib.* 1894; *Mason v. Pate*, 34 Ala. 379; *Holbrook v. Harrington*, 16 Gray, 102; *Saunderson v. Stearns*, 6 Mass. 37; *Sheets' Estate*, 52 Penn. St. 257. And Mrs. Austin, remainder-man of

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the bequest, has the right to file her bill and bring the trustee to account, in such case as the averments of this bill make. Perry on Trusts, 3 ed., § 275.

On the single question of parties complainant,
Reversed and remanded.

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Statutory Detinue for Horse, by Winner at Raffle.

1. *Raffle, or lottery; when winner may recover from bailee.*—The winner at a raffle can not maintain an action against the person who has the possession of the article, until there has been a constructive delivery to him, by which the legal title would be vested, and all inquiry into the illegality of the transaction would be precluded; but, if the defendant, holding possession as bailee for the winner, denies plaintiff's right to recover because he does not produce the winning ticket, plaintiff is entitled to recover on proof of the loss of the ticket and his ownership of it.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WM. E. CLARKE.

This action was brought by Mary Nassano, against Charles F. Koppersmith and two other persons, to recover a horse, which the plaintiff claimed to have won at a raffle, together with damages for its detention. The horse sued for had belonged to the Neptune Fire Company, No. 2, a private corporate body, and, with another horse, was raffled off by the order or authority of the company. The horses were in the engine-house of the company at the time of the raffle, and the raffle seems to have been conducted by the defendants as a committee on the part of the company. After the raffle, they advertised for the holders of the winning tickets, Nos. 18 and 135, to come forward and get their horses, and delivered one of them to the holder of the former ticket; but refused to deliver the other to plaintiff, on her demand, unless she produced the ticket, which she said was lost. The defendants pleaded *non detinet*, and another plea denying plaintiff's ownership; and issue was joined on these pleas. A charge given by the court in favor of the plaintiff's right to recover, and the refusal of several charges asked by the defendants, are now assigned as error.

TOULMIN, TAYLOR & PRINCE, for the appellant, cited *Woods v. Armstrong*, 54 Ala. 150; *McInnis v. The State*, 51 Ala. 23;

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49 Ala. 396; 26 Ala. 71; 20 Ala. 87; 8 Amer. Dec. 682; 10 *Id.* 491; 17 *Id.* 423.

J. L. & G. L. SMITH, *contra*.

SOMERVILLE, J.—The action is brought by the appellee, to recover a horse in the hands of the defendants, which is claimed to have been won by the plaintiff at a raffle, or other device in the nature of a lottery. The horse is shown to have been the property of the Neptune Fire-Company, a body corporate, by whose authority the raffle was ordered. The plaintiff is proved to have held the winning ticket, and excuses her failure to produce it by proof of its loss.

If the contract of delivery be executory, it is not denied that it is void for illegality, and incapable of supporting any form of action which is based on it. If there has been a constructive delivery of the horse to the plaintiff, however, the contract would be an executed one, vesting the legal title in the plaintiff, and any inquiry touching its illegality would be entirely immaterial.—*Hill v. Freeman*, 73 Ala. 200; Bishop on Contr. §§ 140, 432; 1 Addison Contr. § 303.

We are disposed to think that, under the evidence disclosed in the record, the defendants were the bailees of the plaintiff, and not of the fire-company, and, therefore, there was a complete constructive delivery of the property to her as the acknowledged winner. The question is one of intention, deducible from ascertained or admitted facts. It is shown that the defendants were a committee constituted to conduct the raffle or lottery, with authority to deliver the horse in controversy, and also another horse disposed of in the same manner and at the same time, to the parties holding the winning tickets. The other horse was promptly delivered to the holder of ticket number 18, on its presentation, and defendants avowed themselves as always ready to deliver the horse in controversy to the holder of the other winning ticket, which was admitted to be number 135. They accordingly published a notice in the *Mobile Daily Register*, announcing this fact, and requesting the holders of the lucky tickets to call for their horses immediately, as they were anxious to deliver them,—this publication being prior to the delivery of the other horse. They refused to deliver to the plaintiff on demand, solely on the ground that she was not the holder of ticket number 135.

The rule is settled, that where the bailee of a seller, in the ordinary sale of personal property, agrees in advance of such sale to become the bailee of the buyer, this assent becomes irrevocable, and the title passes by constructive delivery. *Edwards, Hudmon & Co. v. Meadows*, 71 Ala. 42; Benj. on

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Sales, § 175. The present case is clearly analogous. The defendants, being at first bailees of the fire-company, agreed to conduct the raffle, and deliver the proper to the holders of the winning tickets; and after the raffle they publicly announced themselves as ready to deliver to such persons on request. They lay no claim to the horse as their property, being mere naked depositaries. Nor does the fire-company refuse to admit ownership in the real winner. The defendants claim to hold for the owner of ticket No. 135, and their only pretense for not delivering is a denial that the plaintiff is such owner. The proof of plaintiff's ownership is clear, and without conflict of evidence. This operated to constitute them the bailees of the winner; and such being the case, there was no error in the various rulings of the court, because the court would have been justified in giving a general charge to find for the plaintiff, if the jury believed the evidence.

Judgment affirmed.

People's Co-operative Association v. Lloyd.

Action for Breach of Special Contract of Employment.

1. *Contract for performance of personal services; discharge before expiration of term; offer of continued employment at less wages.*—When a person is employed for a specified term, at stipulated monthly wages, and is discharged before the expiration of the term, his acceptance of continued service at less wages would be a modification of the original contract, and an abandonment of any claim to more; consequently, his rejection of the offer neither prejudices his right of action, nor reduces the amount of his recovery.

APPEAL from the City Court of Selma.

Tried before the Hon. JONA. HARALSON.

This action was brought by Isaac D. Lloyd against the appellant, a private domestic corporation, to recover damages for the breach of an agreement, by which, in consideration of plaintiff's performance of services as a clerk in defendant's store, the defendant undertook and promised to pay him \$55 per month, from the 1st January, to the 1st September, 1883, but discharged him, without fault, before the expiration of the term; and was commenced on the 30th November, 1883. A trial by jury was waived, and the cause was submitted to the decision of the presiding judge, who rendered judgment for the plaintiff, for \$151.14; to which judgment the defendant

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duly excepted, and now assigns the same as error. It was proved on the trial, as the bill of exceptions shows, that the contract of employment was made verbally by J. H. McIlwain, the president of the defendant corporation, subject to the approval of the board of directors; that the plaintiff continued in the discharge of his duties as clerk in the defendant's store, until on or about the 7th May, when he was informed by one Hall, the superintendent and manager of the store, that he could be employed no longer; but, at the request of Hall, he continued to discharge the duties of clerk, during the temporary absence of another clerk, until about the 15th May. The term of service, as agreed on between plaintiff and said McIlwain, was for eight months, ending September 1st; and when plaintiff was notified by Hall of his discharge, he denied the right of the defendant to discharge him; to which Hall replied, that the contract of employment had never been ratified by the board of directors. It was shown that one of the rules or by-laws of the defendant corporation was in these words: "*Rule 21. The directors shall have management and supervision of the business of the association, shall appoint the salesmen and employees, and shall assign to them such duties and compensation as the directors may think fit.*" As to the ratification of the contract with plaintiff, it was shown that, at a meeting of the board of directors held on the 8th March, 1883, while a proposed reduction of expenses was under consideration, it being suggested that plaintiff's employment had never been ratified, a resolution was offered verbally by T. D. Cory, one of the directors, which was afterwards entered on the minutes in these words: "On motion of Maj. Cory, the trade made with Lloyd by the president and manager is ratified and confirmed *to this date.*" At that meeting of the board, L. H. Montgomery acted as secretary when this resolution was offered and adopted; and he testified, as a witness for the plaintiff, that he committed the resolution to writing as adopted, and that the italicized words were not a part of it. Montgomery left the room before the conclusion of the meeting, and the proceedings were afterwards entered into the book of minutes, from his memoranda, by one Nolan, his successor. Said Nolan testified, on the part of the defendant, that he added the italicized words "because Maj. Cory said the resolution ought to read that way;" but it does not appear at what particular time the words were added, nor whether they were added before or after the next meeting of the board of directors, at which the minutes were read and approved. One of the directors testified, on the part of the defendant, that he understood "the object of the resolution was to discharge or get rid of Lloyd—that they could not discharge or get rid of him in any other way,

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as he had never been employed by the board of directors." The plaintiff, testifying on his own behalf, further stated: "They paid me up to May 15th, 1883. I offered to remain, but Hall said he could not keep me. He told me that I could stay and work, if I would take \$40 or \$45 per month, but I refused to do so." Hall, a witness for the defendant, denied this offer on his part, and said that plaintiff offered to remain at \$40 per month, but he declined to keep him. This is the substance of the evidence, as set out in the bill of exceptions; "and upon this evidence," it is recited, "the court gave a verdict and judgment for the plaintiff."

SUMTER LEA, and W. R. NELSON, for the appellant, cited *Angell & Ames on Corporations*, § 513; *Coffin v. Collins*, 17 Maine, 440; *Bank v. Bonner*, 13 Sm. & Mar. 649; *Meertief v. Strauss*, 64 Ala. 308; *Holloway v. Talbot*, 70 Ala. 392; 15 Conn. 327.

BROOKS & ROY, *contra*.

STONE, C. J.—One of the provisions of the act creating the Selma City Court makes it our duty, on appeal from that court's findings on fact, to "review the same without any presumption in favor of the ruling of the court below on the evidence."—Sess. Acts 1874-5, pp. 386, 390. This, in ordinary cases, would place this court at a great disadvantage. That court examines witnesses *ore tenus*, and can observe their manner while testifying. It goes without saying, that much of the credit we accord to oral communications made to us depends on the manner and appearance of the narrator. The witnesses come not before us, but we are left to form our opinions from a cold, written statement of what has been testified to, with a suspicion, amounting almost to conviction, that an accurate portraiture of the testimony as it was given is not before us. This is a new feature in judicial administration; but the novelty, if not anomaly, does not stop here. We may reverse the City Court's judgment, and render such judgment as we think he should have rendered; and this, without according any weight whatever to his findings. He hears the facts detailed orally, by witnesses examined and cross-examined in his presence, and forms his judgment thereon. But his judgment weighs nothing, and must yield to our judgment, pronounced on an imperfect written statement of what they did testify before another tribunal. This precise thing the statute requires us to do. All of us know the difference in value between a direct communication, and a second-hand report of it.

We have indulged in these reflections, not because they are

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called out by the facts of this case. We do not hesitate to say the finding of the City Court was justified—required by the testimony. Plaintiff's witnesses speak positively, clearly, naturally. Montgomery wrote down the words as soon as they were uttered and adopted; and those words were afterwards copied in the minutes by his successor, and remained unaltered several weeks, before the inapt words, "to this date," were added—not in open meeting—but in some manner not fully explained. Against this, how stands the defendant's version of the transaction? Cory, the mover of the resolution, is not examined, and the record fails to inform us why so important a witness was not called. It is contended, however, that the object of the resolution was to disaffirm the contract, and get rid of Lloyd. Why not disaffirm the contract, if this was the object? Why ratify it as a means of rejecting it? Why not repudiate it, and then, if intended, vote compensation to the plaintiff for the time he had served? The admitted, conditional contract made by McIlwain and Montgomery with Lloyd, was for a gross term of eight months, ending September 1st. The contract was for that term, or it was no contract, if the testimony be believed. Ratification on the 8th of March, to be binding "to this date," is not ratification, but the offer of a new, substituted contract, which could not be binding without Lloyd's consent. A further view: If the resolution of March 8th was a repudiation of the contract, why was Lloyd allowed to remain in the service afterwards?

It is contended, however, that Hall, the new superintendent, offered Lloyd wages at forty or forty-five dollars a month, if he would continue to serve the association, and he refused to be employed. Based on this, it is contended that, inasmuch as Lloyd could thereby have lightened the burden on defendant, his claim to that extent should be abated. It might be sufficient answer to this claim, that Hall positively denies the making of such offer, and thus leaves the disputed fact on the testimony of witness against witness. But, as we understand Lloyd's testimony, it was at most an offer by Hall to retain him, if he would consent to a reduction of his wages to that extent. If he had so consented, and remained in the service of the association, this would have operated a modification of the contract, and an abandonment of all claims to higher wages.—*Strauss v. Meertieff*, 64 Ala. 297; *Holloway v. Talbot*, 70 Ala. 389. Lloyd was justified in refusing the offer.

Affirmed.

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Action on the Case by Landlord, against Purchaser of Crops with Notice of Statutory Lien.

1. *When action lies.*—An action on the case lies in favor of the landlord, against one who, having knowledge or notice of the landlord's statutory lien, purchases from the tenant the crops grown on the rented lands, and removes or converts them, whereby the lien was lost or destroyed.

2. *Landlord's lien for advances.*—The landlord's lien for advances is placed by the statute on the same basis of equality as his lien for rent (Code, § 3469; Sess. Acts 1878-9, p. 72); any balance remaining due at the end of the year, the tenancy continuing for another year, is regarded as advances made on the crop of that year, and is protected by the lien of that year; and it is not necessary that the same lands shall be cultivated each year.

APPEAL from the Circuit Court of Bullock.

Tried before the Hon. H. D. CLAYTON.

This action was brought by Moses W. Thompson, against Amos Powell and others, and was commenced on the 20th May, 1882. The complaint contained but a single count, which alleged that, on or about the 1st January, 1880, plaintiff rented to said Amos Powell, for the year 1880, a certain tract of land in said county, for the rent of which said Powell agreed to pay twenty bales of cotton of specified weight, and also advanced to said Powell, in money and other articles necessary for the sustenance and well-being of the tenant and his family, and for cultivating, saving, gathering and harvesting the crops grown on the rented lands, the sum of \$3,000; that Powell occupied and cultivated the rented lands during the year 1880, and, at the end of the year, owed plaintiff a balance of \$3,000, which said balance was still due and unpaid; that Powell continued to occupy said lands, with other lands of said plaintiff, during the year 1881, and agreed to pay plaintiff, as rent for the year, twenty bales of cotton of specified weight; that plaintiff made additional advances to him during the year, to the amount of \$3,000; that Powell occupied and cultivated the lands during the year 1881, and raised thereon crops of corn, cotton, &c., upon which plaintiff had a lien for said rent and advances, which are still due and unpaid; and plaintiff avers that said defendants took possession of and removed said crops from said rented premises, without paying the said rent and advances due as aforesaid, and without the consent of the plaintiff, and with a knowledge of the plaintiff's lien upon said crops, and

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converted to their own use, of the crops grown on said rented lands during said year 1881, six bales of cotton, weighing 500 lbs. each, 10,000 lbs. of fodder, 500 bushels of corn, and 2,000 bushels of cotton-seed, and prevented plaintiff from enforcing his said lien for said rent and advances on said crops so removed and converted; to plaintiff's damages as aforesaid."

The defendants filed a joint demurrer to the complaint, on the ground that the landlord could not maintain a joint action on the case against his tenant and others for an alleged removal and conversion of the crops; and they also demurred to "so much of the complaint as seeks to recover damages from the defendants for an injury to his lien as landlord for advances made by him to said Amos Powell during the years 1880 and 1881;" assigning as grounds of demurrer to this part of the complaint—"1st, the same causes assigned to the entire complaint; 2d, that plaintiff's lien for advances made to his tenant, Amos Powell, and for the rent alleged to be due for the year 1880, is a lien created by statute, and the statute prescribes process of attachment as the exclusive remedy for the enforcement thereof against the tenant, and the plaintiff can not maintain an action on the case against the tenant and others, for an alleged joint injury to his said lien." Amos Powell also filed separate demurrers, assigning the same causes or grounds. The court overruled the demurrers to the entire complaint, but sustained the demurrers to the part specified; and this ruling is now assigned as error by the plaintiff.

POWELL & CABANISS, NORMAN & SON, and WATTS & SON for the appellant.

J. N. ARRINGTON, *contra*.

SOMERVILLE, J.—It is now a settled rule in this State, established by a series of decisions, that a landlord may maintain an action on the case against any one or more defendants, who, with notice of the landlord's lien for rent or advances, purchases from the tenant the crops grown on the rented premises, and afterwards removes or converts them, so as to defeat, or otherwise obstruct, the enforcement of such lien by the statutory remedy of attachment. The theory of these cases is, that the removal, or other conversion of the crops, was an unlawful act, by which an injury has been done the landlord, the extent of which is the value of his lien.—*Lake v. Gaines*, 75 Ala. 143; *Hurst v. Bell*, 72 Ala. 336; *Kennon v. Wright*, 70 Ala. 434; *Boggs v. Price*, 64 Ala. 514; *Lavender v. Hall*, 60 Ala. 214; *Westmoreland v. Foster*, 60 Ala. 448; *Lomax v. LeGrand*, *Id.* 537; *Hussey v. Peebles*, 53 Ala. 432. The

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principle is analogous to, if not strictly identical with, that which affords a like remedy against one who converts property upon which a plaintiff has an equitable mortgage.—*Rees v. Coats*, 65 Ala. 256; *Collier v. Faulk*, 69 Ala. 58; *Mayer v. Taylor*, *Id.* 403; *Hurst v. Bell*, *supra*.

The rulings of the court indicate, that this principle was recognized and applied so far as to protect the lien of the plaintiff for rent and advances for the year 1881; but it was limited to this particular year, and denied so far as to exclude from its operation the advances made by the plaintiff, as landlord, for the previous year, 1880. We can see no sufficient reason for this distinction. There is no difference in the dignity or nature of the landlord's lien for *rent*, and that for *advances*. Each is placed by the statute upon precisely the same basis of equality. Code, 1876, § 3467. The same is true whenever a tenant fails to discharge his indebtedness for rent and advances for any year, and "continues his tenancy under the same landlord;" the balance so due for rent and advances is "held as so much advanced by the landlord towards making the crop of the succeeding year," and operates as a lien upon the crop and upon the articles advanced, or other articles for which they may be bartered or exchanged.—Code, 1876, § 3469; Acts 1878-79, p. 72.

The essential thing contemplated by the latter section is the continuation of the relation of landlord and tenant between the same parties for another year. It is not material that the same acreage of land should be cultivated, nor indeed the same land. The purpose of the statute is to afford such security to the landlord as to remove the temptation, frequently presented, of denuding the tenant of all that he has, so as to cripple, if not destroy, his ability to continue his tenancy another year. It is the identity of the relation, therefore, and not the identity of the land cultivated, which seems to be embraced within the spirit as well as the letter of this law. It would lead to much confusion and inconvenience in agricultural contracts of this character, should the rule be established, that the lien given by this statute would be forfeited and lost irrevocably by the accident of the landlord's adding or subtracting a few acres of land in undertaking to contract for a new tenancy for a succeeding year. We are satisfied that the General Assembly did not so intend. The statement, therefore, in the complaint—that the tenant, Powell, occupied and rented, during the year 1881, some other lands belonging to the plaintiff, additional to those rented the previous year—would not operate to deprive him of his lien upon the crops either for the rent or advances, which had been brought forward as a balance from the year 1880.

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The Circuit Court erred in sustaining the demurrer; and its judgment must be reversed, and the cause remanded.

CLOPTON, J., not sitting.

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Action on Account; Plea of Set-Off.

1. *Account rendered; evidence as to items.*—An itemized account for cotton sold and shipped by defendant to plaintiffs, on which he claimed a balance due him, and pleaded it as a set-off, having been furnished by him to them, as he testified, and retained by them without objection to the weights of the cotton as therein specified; that portion of the account can not be excluded as evidence, on motion, because defendant further states that he did not himself weigh the cotton, but that the weights were furnished to him by the public weigher.

2. *Account stated, or settlement; conclusiveness of.*—An admission of the correctness of an account rendered, whether express, or implied from its retention without objection within a reasonable time, is not conclusive, but may be disproved by satisfactory proof of mistake; though, when a settlement has been made, and it is afterward sought to re-examine and surcharge or falsify the account, fraud must be shown, as a general rule, or gross mistake in the reckoning.

APPEAL from the Circuit Court of Barbour.

Tried before the Hon. H. D. CLAYTON.

This action was brought by the appellants, merchants doing business as partners in the city of Philadelphia, against Jason G. Guice; and was commenced on the 14th September, 1882. The plaintiffs claimed, in the first count of their complaint, the sum of \$404.55 alleged to be due from defendant "by account on the 26th April, 1881;" and in the second count, the same sum as due upon an account stated between them on or about the 7th February, 1881. The defendant pleaded the general issue, and a special plea of set-off, claiming that the plaintiffs owed him \$500 "by account due December 11th, 1880;" and issue was joined on both of these pleas.

The evidence adduced on the trial, as appears from the bill of exceptions, showed that the controversy between the parties grew out of a "cotton transaction," as it is termed; the defendant having shipped to plaintiffs a certain quantity of cotton, which, as he claimed, they had bought from him, and for which he claimed a balance due; while the plaintiffs insisted that, by the terms of the contract between them, the cotton was to be sold by them on defendant's account, and that he was in-

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debted to them for the difference in price on the sale by them. "Plaintiffs introduced evidence tending to show that defendant was indebted to them in the sum of \$404.55, as stated and claimed in their complaint; and that a true and correct statement of their account had been furnished to said defendant on or about February 11th, 1881; and that the same had never been disputed in any way, and no objection had ever been made to it, so far as plaintiffs were informed, until within a very short time before the commencement of this suit. The defendant introduced in evidence the account hereto attached as 'Exhibit A,' and evidence which tended to show that plaintiffs were indebted to him on account of said cotton transactions, as shown by said exhibit, in the sum of \$500; that said cotton was sold by him to plaintiffs, he guaranteeing that it would not lose more than five pounds per bale; that he forwarded to them an invoice containing the weights of the cotton; that plaintiffs, soon afterwards, acknowledged receipt of said invoices by letter, and never disputed the correctness of the weights as therein set forth, and never claimed of defendant any thing on said guaranty as to loss of weight;" also, that he wrote two letters to plaintiffs, which they received, and in which he called on them for their account of the cotton shipped. In this connection, the plaintiffs reserved an exception to the refusal of the court to exclude the evidence in reference to the weights of the cotton as specified in the invoices, as more particularly stated in the opinion of the court.

The plaintiffs requested the following charges to the jury: (1.) "If the jury believe, from the evidence, that the plaintiffs wrote and transmitted by mail to the defendant the letter read in evidence, dated February 7th, 1881, and inclosed in said letter the account-current also in evidence, dated 7th February, 1881, which shows a balance due by defendant to plaintiffs, on said 7th February, 1881, of \$431.37; and if the jury further believe, from the evidence, that said letter and said account-current were received by the defendant in due course of mail, and shortly after said 7th February, and that he retained said account-current, and did not make any objection to the correctness of said account within a reasonable time thereafter, then the law presumes that said account is correct, and the defendant is bound by it." (2.) "If the account sued on was furnished to the defendant, and he failed to make objection to it within a reasonable time, and he knew all the facts and *data* from which said account was made out and stated; and if the jury further believe that there was no fraud of any kind in the account, or in the facts and *data* upon which it was made up, then the defendant can not now deny the correctness of said account."

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The court refused each of these charges, and instructed the jury as follows: "If the jury believe, from the evidence, that the plaintiffs wrote and transmitted by mail to the defendant the letter read in evidence, dated 7th February, 1881, and inclosed in said letter the account-current of the same date, which shows a balance of \$431.37 due by defendant to plaintiffs on that day; and if they further believe, from the evidence, that said letter and said account-current were received by the defendant in due course of mail, shortly after said 7th February, 1881, and he retained said account-current, and did not make any objection to the correctness of the same within a reasonable time thereafter, then the law presumes that said account is correct, and the defendant is bound by it, unless he shows that it is incorrect."

The plaintiffs duly excepted to the refusal of the charges asked, and they now assign such refusal as error, together with the admission of the evidence to which they excepted.

McKLERoy & COMER, for the appellants, cited *Langdon v. Roane's Adm'r*, 6 Ala. 518; *Burns v. Campbell*, 71 Ala. 286; 6 Wait's Actions & Defenses, 427 *et seq.*

PUGH & MERRILL, *contra*, cited *Sanders v. Stokes*, 30 Ala. 432; *Pike v. Elliott*, 36 Ala. 69; *Bryan v. Ware*, 20 Ala. 692; *Langdon v. Roane's Adm'r*, 6 Ala. 518; *Burns v. Campbell*, 71 Ala. 286.

STONE, C. J.—The plaintiffs had their business residence in Pennsylvania. The defendant resided in Alabama. In the progress of the trial, the defendant offered testimony—himself being the witness—that he had furnished to the plaintiffs an itemized account of the claim he pleaded in set-off. The account was for cotton, alleged to have been sold and shipped to plaintiffs, on which defendant claimed there was a balance due him. Witness testified, that plaintiffs retained the account, and, while they objected to the claim on other grounds, they made no objection to the alleged weights of the cotton. On cross-examination, this witness stated he had not seen the cotton weighed, but that the weights were furnished to him by the public weigher. Plaintiffs moved to reject from the jury so much of the account furnished, as related to the weights of the cotton. This motion was overruled, and they excepted. The testimony was clearly admissible, as part of the account furnished, and as some evidence tending to show an acquiescence in that part of the account which was not objected to. 2 Greenl. Ev. § 126. The weight and application of the testi-

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mony should have been raised on charges asked. They are not presented by a motion to exclude.

It is undoubtedly the law, that if a debtor, to whom an account is rendered, retains it without objection for an unreasonable time, this is enough to raise the presumption that he admits its correctness.—*Langdon v. Roane*, 6 Ala. 518; *Burns v. Campbell*, 71 Ala. 271, 286. It is, however, only evidence of an admission, and can not be more conclusive than an express admission that the account is correct. Either is subject to disproof; and when it is satisfactorily shown that the account is not correct, this destroys the force of the admission, and shows it to have been made in mistake. This is the rule, when a right of recovery is claimed on the strength of such admission, express or implied. When, however, a settlement has been made, and it is sought to re-examine, and overcharge or falsify the account, to authorize relief, there must, as a general rule, appear to have been fraud, or gross mistake in the reckoning.—6 Wait's Ac. & Def. 427.

The first charge asked by plaintiffs states the principle too strongly, was likely to mislead, and, on that account, was rightly refused. The second charge asked is still more objectionable. It limits the right to resist the force of such admission to cases of fraud. The Circuit Court laid down the true doctrine in the charge given.

There is no error in the record, and the judgment of the Circuit Court is affirmed.

Campbell v. White.

Bill in Equity for Relief against Judgment at Law.

1. *Equitable relief against judgment at law; refusal of continuance on account of sickness.*—An application for a continuance is addressed to the discretion of the primary court, and its refusal is neither revisable on error or appeal, nor ground for equitable relief against the judgment; consequently, the defendant can not obtain equitable relief against the judgment on the ground that he was prevented by sickness from attending and making defense at the trial term, when it appears that his attorney asked a continuance on that ground, and the court refused it.

APPEAL from the Chancery Court of Coffee.

Heard before the Hon. JOHN A. FOSTER.

J. E. P. FLOURNOY, for the appellant, cited *Beadle v. Graham*, 66 Ala. 102; 1 Brick. Dig. 666, § 376; 2 Story's Equity, §§ 81, 887.

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SOMERVILLE, J.—We can see no ground for the intervention of a court of equity in the present case. The purpose of the bill is to obtain equitable relief against a judgment at law, in the nature of a bill for a new trial. Conceding that the complainant shows that he had a valid defense to the action in which the judgment was rendered,—which in our view is not made clear—he fails to show that he was prevented from making it by accident, surprise, mistake, or the fraud of the opposite party, unmixed with negligence on his own part, which was essential as a condition precedent to equitable interference. *Beadle v. Graham*, 66 Ala. 102; Story's Eq. Jur. §§ 887–8; 1 Brick. Dig. 666, § 376.

It is shown that the complainant employed an attorney to defeat this action in the Circuit Court, being prevented by sickness from attending in person. An application for *continuance* was presented, based on the ground of such absence, rendered necessary by sickness; and this was overruled by the presiding judge. It is insisted that the complainant was prevented from making his defense at law by reason of the accident of his sickness, and for this reason relief should be granted him in equity. This is a misapprehension of the legal relation of the facts. The immediate fact which prevented the complainant from making his defense was not his sickness, or his absence occasioned by it; for, if the cause had been continued to another term, these obstacles might have been obviated. It was rather the action of the law court in refusing the application for a continuance. The exercise of this power was entirely discretionary with the Circuit Court. An erroneous exercise of it was not even the subject of review on direct appeal to this court.—*Humes v. O'Bryan*, 74 Ala. 64. Much less will it be reviewed collaterally by a court of equity, as it is sought to do in this proceeding. Courts of equity uniformly refuse to usurp appellate jurisdiction by interfering to grant new trials, upon grounds which have already been considered and adjudged at law, however manifestly erroneous the action of the law court may have been.—*Oliver v. Bay* (4 Ohio, 175), 19 Amer. Rep. Note, 603, 607; Freeman on Judg. § 486. The case of *Gales v. Shipp*, 2 Bibb, 241, is an authority for the proposition, that a refusal of the law court to continue a cause is no ground for equitable intervention.

The soundness of this conclusion is subject to a test which would seem infallible. The Circuit Court itself possesses, by statute, the same jurisdiction to grant rehearings of its own final judgments as that ordinarily assumed by Chancery, and in precisely the same class of cases, provided the application be made within four months from the rendition of judgment. Code, 1876, §§ 3161–3171; *Renfro Bros. v. Merriman & Co.*,

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71 Ala. 195. If the complainant had presented his application to the court in which the judgment was rendered, it is manifest that the case would resolve itself simply into an effort to induce the Circuit Court to revoke its order refusing a continuance; and this after final judgment and adjournment, without the presentation of any additional facts which could not as well have been presented to the attention of the law court upon the occasion of its original ruling.

The decree of the chancellor dismissing the bill was free from error, and must be affirmed.

Tomlinson v. Watkins.

Bill in Equity for Cancellation of Deed, as Cloud on Title.

1. *Cancellation of deed as cloud on title; when refused.*—When the complainant acquired his possession by force and arms, or other unlawful means, a court of equity will not interfere to protect it by cancelling a deed as a cloud on his title.

2. *Cancellation of conveyance by husband and wife; ignorance of contents.*—A conveyance of the wife's property, duly executed by her and her husband, will not be cancelled and set aside, at her instance, on averment "that she was induced and persuaded by her said husband to sign said deed, without knowing the purport and effect thereof."

APPEAL from the Chancery Court of Conecuh.

Heard before the Hon. JOHN A. FOSTER.

The original bill in this case was filed on the 28th February, 1880, by Mrs. Georgiana A. Tomlinson, the wife of William D. Tomlinson, against Henry H. Watkins, Bryant Johnson, and said William D. Tomlinson; and sought the cancellation of a deed executed by said Johnson to said Watkins, conveying a tract of land of which the complainant had possession, as a cloud on her title; and the general prayer was added, for other and further relief. The tract of land, which contained four hundred acres, and on which was situated a saw and grist-mill, had belonged to said W. D. Tomlinson, and was conveyed by him, by deed dated March 10th, 1868, to P. D. Page and William Beard, as trustees for his wife, in consideration, as recited, of his indebtedness to her for moneys and property belonging to her statutory separate estate, which he had wasted and converted to his own use; the *habendum* clause being "to the said Page and Beard, and their successors in office, as trustees of the said Georgiana Tomlinson, in trust as aforesaid, to the sole and separate use and benefit of the said Georgiana, her

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heirs and assigns forever, free from any and all control or dominion on my part whatever; it being the intention of this deed that the same shall restore to her said trust estate, in part, the value of so much thereof as has been by me destroyed, as herein set forth, in violation of my duty as trustee in the premises, the same to operate in perpetual bar of myself and all other persons claiming or pretending to claim by, through, or under me." On the 5th April, 1873, by deed of that date, duly executed, and attested by two witnesses, Tomlinson and wife conveyed an undivided half interest in said tract of land to said Bryant Johnson, on the consideration, as therein recited, of one thousand dollars in hand paid; but the bill alleged, that said Johnson also executed and delivered to Tomlinson, as part of the consideration, his three promissory notes for \$666.66 each, payable to the complainant, and three other notes for the same amount, payable to James Cunningham, to whom said Tomlinson was indebted, and to whom said three notes were delivered by him; and that, to secure the payment of these several notes, Johnson and his wife executed to said Tomlinson and Cunningham a mortgage on said tract of land, with the mill and improvements. A copy of the deed from Tomlinson and wife to Johnson was made an exhibit to the bill, and also a copy of the mortgage executed by Johnson to Tomlinson and Cunningham. As shown by these exhibits, the deed recites a consideration of one thousand dollars in hand paid, and does not mention the notes; and the mortgage purports to be given to secure only the three notes payable to Cunningham.

The original bill alleged, that the sale and conveyance to Johnson "was made without the knowledge or consent of your oratrix, and she has never realized anything from said sale, nor has her said husband, as her trustee, received any consideration in her behalf;" but, by amendment, these allegations were struck out, and the following inserted: "Oratrix further states and avers, that she was induced and persuaded by her said husband to sign said deed, without knowing the purport and effect thereof; that she did not then, and has never since, realized or received anything from said sale, nor has her said husband, as her trustee, received any consideration in her behalf; that the only money realized on said sale was the amount paid to said Cunningham by said Johnson on said mortgage, as heretofore alleged; and that said deed was delivered by her said husband to said Johnson, who thereupon went into the possession of said land."

On the same day this deed and mortgage were executed (April 5th, 1873), another deed was executed to said Johnson by said James Cunningham, who claimed to have bought an interest in the land at sheriff's sale against said Tomlinson, and

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who conveyed by his deed an undivided half interest; the purchase-money being secured and paid by the three notes above mentioned. Johnson continued in the possession of the land until May 18th, 1874, when he sold the property to said Tomlinson and H. H. Watkins, who wished to form a partnership in the mill business. The agreed purchase-money was \$2,666, of which amount Watkins advanced \$666, and Tomlinson paid the residue with the three notes above mentioned, which had been taken payable to Mrs. Tomlinson, the complainant; but the agreement was, that each party was to have an equal interest in the land and mill property. On the same day (May 18th, 1874), Johnson and his wife executed a deed conveying the entire property to said Watkins, on the recited consideration of \$300; and another deed conveying the entire property to the complainant, on the recited consideration of \$2,000. This is the conveyance under which the complainant claimed the property, and the conveyance to Watkins is the deed which she asked to have cancelled as a cloud on her title.

Tomlinson and Watkins carried on the mill business as partners for several years, but finally disagreed, and a bill was filed to settle their partnership matters. On the evening of the 8th November, 1879, the complainant took possession of the property, her son acting as her agent; and she was in possession when her bill was filed. Watkins stated in his answer, and also testified as a witness in his own behalf, that the possession was taken forcibly, several of the party being armed with guns and pistols, and making threats of violence if any resistance were offered; while the complainant's witnesses denied that any force or threats were used, and said that the persons present at the time, who had guns, had been out duck-hunting, and stopped at the mill by chance.

On final hearing, on pleadings and proof, the chancellor dismissed the bill, holding that Tomlinson's deed to Page and Beard, as trustees, created an equitable separate estate, which the complainant might charge or convey without restriction; and that neither the allegations of the bill, nor the proof, showed any ground for setting aside the deed to Bryant Johnson. The complainant appeals from this decree, and here assigns it as error.

GEO. R. FARNHAM, and STALLWORTH & BURNETT, for appellant.

S. J. CUMMING, and P. D. BOWLES, *contra*.

STONE, C. J.—It is very questionable if the possession of the complainant was not acquired under such circumstances as

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that chancery will not lend its aid for its protection.—*Turnley v. Hanna*, 67 Ala. 101.

One purpose of this bill is to avoid the force of a conveyance to Bryant Johnson, made by Tomlinson and wife (the latter the complainant in this suit) in April, 1873. That deed conveyed only an undivided half interest in the lands in controversy. The averments of the bill do not make a case for setting aside that conveyance; and if they did, there is a fatal want of proof to make out this feature of the case.—*Miller v. Marx*, 55 Ala. 322; *Coleman v. Smith*, *Ib.* 368; *Dawson v. Burrus*, 73 Ala. 111; *Yonge v. Hooper*, *Ib.* 119.

Johnson and wife conveyed the property to Watkins, the appellee, and thereby conveyed to him all the title acquired by the deed of Tomlinson and wife. This was, at least, a conveyance of the legal title to an undivided half of the land. The chancellor did not err in refusing to vacate the deed to Watkins, for more reasons than one. First, it vested a legal title in the latter, subject, perhaps, to any claims Mrs. Tomlinson may have under the contract with Johnson. If it be supposed the legal title had re-vested in Mrs. Tomlinson, because the mortgage given by Johnson was over-due, and not paid, the answer is two-fold: The mortgage is made to W. D. Tomlinson and Cunningham—not to her; and in equity, a mortgage is only a security for money, and this is a proceeding in equity. *Toomer v. Randolph*, 60 Ala. 356. Second, the deed contains covenants of warranty, giving to Watkins a right of action against Johnson, in the event of his eviction.

The bill in this case, as framed, entitles the complainant to no relief, and the chancellor did not err in dismissing it. It would seem that Mrs. Tomlinson, if she desires it, is entitled to a quit-claim re-conveyance of an undivided half of the land, or a declaration that the deed to Watkins vests in him only an undivided half interest. He claims only that much. But this bill is wanting in necessary frame and averments to obtain such relief. It may be, also, that she can enforce her claim for the purchase-money promised by Johnson, and never paid by him; but it seems W. D. Tomlinson employed those notes in re-purchasing the lands in joint adventure with Watkins. That half interest, it is shown, was purchased for Mrs. Tomlinson's benefit. This record fails to show that Watkins has violated any of the stipulations he entered into.

The decree of the chancellor is affirmed.

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Bill in Equity by Judgment Creditors, to set aside Mortgage, or have it declared General Assignment, and for Sale of Property.

1. *Who are necessary parties to bill; general rule.*—The general rule is, that all persons who are interested, legally or beneficially, in the subject-matter of the suit, whose rights or interests are affected, or sought to be concluded by the decree, are necessary parties to the bill; and persons who are shown to have once had an interest, which would be materially affected by the decree, must be brought in as parties, unless it is also shown that their interest has ceased, or has become vested in some other person who is a party.

2. *Same; mortgagees, and assignees.*—Junior mortgagees are necessary parties to a bill filed by judgment creditors, seeking to set aside a prior mortgage, or to have it declared a general assignment, asserting a superior lien on the property conveyed, and asking to have it sold for the satisfaction of their judgments; and an averment that another person, who is made a party, claims to be the owner of the junior mortgage, does not obviate the necessity of bringing in the mortgagee himself, as the holder of the legal title.

3. *Lien of judgment and execution.*—Under our statutes, a judgment is not a lien on the defendant's property, real or personal, but a lien is created by the issue of an execution and its delivery to the sheriff (Code, § 3210); which lien continues, so long as executions are regularly issued without the lapse of an entire term; but, when the lien has been once lost, by the lapse of an entire term without an execution, it can not be revived, so as to give it continuous force as if there had been no chasm, though a new lien may be acquired by a subsequent execution.

4. *Failure to issue execution for ten years.*—When ten years have elapsed without the issue of an execution, the plaintiff is not entitled to an execution without a revivor of the judgment (Code, §§ 3173-74), though an execution so issued may be only voidable only; and the judgment being inoperative and dormant unless revived, the plaintiff stands, in a court of equity, as a creditor by simple contract only.

5. *Lien of judgments of Federal courts.*—In the absence of legislation by Congress, the lien of judgments rendered by the Federal courts depends on State laws; and by express provision (U. S. Rev. Stat., § 967), the lien of such judgments ceases "in the same manner, and at like periods," as the judgments of the State courts.

APPEAL from the Chancery Court of Bibb.

Heard before the Hon. THOMAS COBBS.

The bill in this case was filed on the 25th September, 1883, by Perkins, Livingston & Post, late partners carrying on a mercantile business in the city of New York, and J. F. Johnston, as complainants, claiming to be judgment creditors of the Brierfield Iron Works Company, a private corporation organ-

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ized under the laws of this State, against the said corporation, and several other persons who claimed interests in property which had belonged to it; and sought, principally, to have the property subjected by sale to the satisfaction of the complainants' judgments. The said corporation was organized under an act of the General Assembly of Alabama, approved January 28th, 1867, entitled "An act to incorporate the Brierfield Iron Works Company of the county of Bibb."—Sess. Acts 1866-7, pp. 229-31. Said corporation became indebted, soon after its organization, to said Perkins, Livingston & Post, then doing business as partners in New York; and an action being brought on this indebtedness, in the District Court of the United States at Montgomery, they recovered a judgment against said corporation, on the 30th May, 1870, for \$2,360.96. An execution was issued on this judgment, on the 19th September, 1870, and was levied on certain lands belonging to the defendant; but, for reasons unknown to complainants, no sale was made under the levy, and no other execution was ever levied on the judgment. In March, 1867, said corporation became indebted to the First National Bank of Selma, which afterwards suspended and ceased to do business, C. Cadle being appointed receiver of its property and assets; and said Cadle, as such receiver, recovered a judgment against said corporation, in the District Court of the United States at Montgomery, on the 26th May, 1869, for \$7,501.77. An execution was issued on this judgment, on the 18th September, 1869, which was levied on the same lands; but no sale was made, for want of time. An *alias* execution was issued on the 17th October, 1870, and placed in the hands of the marshal, but no levy was made under it; and a *pluries* execution was issued on the 2d December, 1882, which was returned by the marshal, May 7th, 1883, "No property found." J. F. Johnston, one of the complainants, purchased this judgment, and was the owner of it when the bill was filed; and it was alleged that each of said judgments was wholly unsatisfied.

On the 1st January, 1867, before the organization of said corporation, but in anticipation thereof, F. S. Lyon and others, the principal corporators, borrowed \$22,400, "for the benefit of said corporation thereafter to be organized," from John T. Walton, and executed to him their promissory note for the amount, dated January 1st, 1867, and payable twelve months after date. On the 19th March, 1867, after the organization of the corporation, and after the creation of the debts held by the complainants, said corporation executed its mortgage to said Walton, "wherein and whereby it conveyed to said Walton substantially all the property owned by it, real, personal and mixed, to secure the payment of said note for \$22,400." As

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to this mortgage the bill alleged, "that there was no indulgence given, no consideration paid, no benefit acquired by said corporation, and no detriment sustained by said Walton in the acquirement of said mortgage; that said mortgage was signed by said corporation by its president, but was not attested, nor acknowledged, and was filed for record in this condition, to-wit, on the 25th March, 1867, and was recorded; that afterwards, as orators are advised, to-wit, in the month of April, 1867, it was acknowledged by said president of said corporation, before a notary public, but was never again filed for record or recorded after such acknowledgment; that orators acquired their said judgments against said corporation without any notice of said Walton mortgage, and neither they, nor any one of them, nor the said C. Cadle, had any notice of the execution, acknowledgment, delivery or record of said Walton mortgage, until within the present year, when they were informed thereof."

In April, 1867, as the bill further averred, said corporation executed and delivered to E. A. Glover a mortgage on all of its said lands, to secure the payment of its promissory note for \$10,666.66; which mortgage was duly acknowledged and recorded, "and John C. Webb now claims to own said note and mortgage." In May, 1867, said corporation executed and delivered another mortgage on all of its lands, to John Collins, to secure the payment of a note for \$14,504.57; which said mortgage was duly acknowledged and recorded, "and Charles W. Collins now claims to own the said note and mortgage." In June, 1867, said corporation executed and delivered another mortgage on all of said lands, to W. B. Inge, to secure the payment of a promissory note for \$5,000; which said mortgage was duly acknowledged and recorded, and the executors of the last will and testament of said W. B. Inge "now claim to own said note and mortgage." Each of these mortgages, the bill further alleged, "conveyed substantially all the property then owned and possessed by said corporation, and each was, under the laws of this State, as to the creditors of said corporation, a general assignment."

On the 25th February, 1870, as the bill further averred, Lyon, Whitfield, James Crawford and others, stockholders in said corporation, purchased said note and mortgage from Walton, and took an assignment thereof to said Crawford for their joint benefit; and Crawford thereupon signed an instrument of writing, which specified the amounts paid by each of the parties, and stipulated that the property was held by him, in trust for their benefit, in proportion to the sum paid by each respectively. Copies of these instruments were made exhibits to the bill. In November, 1874, J. F. Griffin, one of the stock-

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holders and beneficial owners of the Walton note and mortgage, filed a bill in chancery against the corporation, the other stockholders, and the owners of the other mortgages above mentioned, asking a foreclosure of the several mortgages and a sale of the property; but, at the instance of said Lyon and the other holders of the Walton note and mortgage, who represented that the corporation was about to execute a deed of trust on all of its property for the benefit of its creditors, this suit was not prosecuted to a hearing. Accordingly, on the 30th November, 1874, said corporation executed a deed conveying substantially all of its property to E. W. Pettus and J. T. Jones as trustees, and "providing substantially for the payment of all its debts," including the complainants' judgments, "but not undertaking to establish the priorities of the several creditors as between themselves;" and this trust was accepted by said J. T. Jones, one of the trustees therein named. The complainants were never consulted about the execution of this deed, and they had no notice of it, except as they may be charged with notice by its registration; and the deed has never been foreclosed.

In March, 1876, said Crawford advertised the lands for sale under the power contained in the mortgage to Walton; and at the sale made by him, by agreement among all the beneficial owners of said note and mortgage, the lands were bid in by Lyon and Browder, two of said beneficial owners, in trust for themselves and the others, and were conveyed to them by said Crawford. Afterwards, during the year 1880, Lyon and Browder entered into an agreement with C. C. Huckabee, "which was, substantially, that he was to effect a sale of the said lands and property for the sum of \$50,000, and, in the event he succeeded in doing so, they were to pay him \$5,000;" and in January, 1881, Huckabee having negotiated with W. D. Carter and A. K. Sheppard for the sale of a part of said lands at the price of \$50,000, Lyon and Browder conveyed all the lands to him by quit-claim deed, and he conveyed a part to said Carter and Sheppard, receiving \$50,000 in money and notes, which he paid over and delivered to said Lyon and Browder, retaining \$5,000 for his compensation. Afterwards, Huckabee sold and conveyed the residue of said lands to the Brierfield Iron and Coal Company, another corporation organized under the laws of Alabama; and said corporation subsequently bought from Carter and Sheppard the lands conveyed to them by said Huckabee. Of the agreed purchase-money of the lands, said corporation owed \$20,000 for the lands bought from Huckabee, and \$50,000 for the residue.

The bill charged that the mortgage to Walton was without consideration, and void as against the complainants; that the sale and conveyance by Crawford to Lyon and Browder was

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also void, and passed no interest as against the complainants, and that each of the other mortgages was subordinate to the complainants' rights as judgment creditors. The two corporations, Huckabee, Pettus and Jones as trustees, Charles W. Collins, John C. Webb, and the executors of the last will and testament of W. B. Inge, deceased, were made defendants to the bill; and the prayer was expressed in these words: "Your orators pray that, on the hearing of this cause, your honor will cause an account to be taken of what is severally due them from said Brierfield Iron Works Company, and, in default of payment thereof, will decree that the said Walton mortgage was and is void as to them, and that the equity of your orators is superior to all others, and that the said lands be sold to satisfy their said debts; or, if your orators are mistaken in regard to the validity of said Walton mortgage, and as to said sale by Crawford, that your honor will decree that said mortgage to Walton was and is a general assignment, and will cause said lands to be sold and distributed in this court among the creditors of said company according to their several equities; or, if your honor shall think that your orators are not entitled to the relief above prayed, that your honor will decree that they have a right to subject to the satisfaction of their debts the amount still due from said Brierfield Coal and Iron Company, as herein above alleged, and direct the same to be paid into this hon. court, and distributed under its direction;" and the general prayer, for other and further relief, was added.

A decree *pro confesso* was entered against Huckabee, but was afterwards set aside; and he then filed a demurrer to the bill, assigning several causes of demurrer, which were in substance, these: 1st, the want of necessary parties, because neither Carter, nor Walton, nor Glover, nor John Collins was made a party; 2d, that complainants' judgments are dormant, and no execution could lawfully issue upon them; 3d, that the complainants do not show that they are judgment creditors. The chancellor sustained the demurrer on all the grounds assigned, except as to the necessity of making Walton a party; and his decree is now assigned as error by the complainants.

JOHNSTON & NELSON, for appellants.

PETTUS & PETTUS, *contra*. (No briefs on file.)

CLOPTON, J.—We find in the record a demurrer to the bill, filed February 6th, 1884, by the Brierfield Iron and Coal Company and Caswell C. Huckabee; but, as it appears that, at that time, there was a decree *pro confesso* against Huckabee, which was subsequently set aside, and thereafter a separate de-

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murrer filed by him, and as the decree from which the appeal is taken appears to have been on the separate demurrer, we shall restrict our consideration to the grounds of the demurrer filed after the decree *pro confesso* was set aside; assuming that the first was abandoned, or not insisted on, having been irregularly filed.

The purposes of the bill seem to be three-fold: 1st, to have the mortgage to Walton declared void as against complainants, and the property of the Brierfield Iron and Coal Company sold for the satisfaction of their judgments, as having a prior lien; 2d, failing in this, to have the mortgage to Walton declared a general assignment, and the proceeds of the property distributed according to the equities of the parties; 3d, to enforce the deed of trust to Pettus and Jones, and have the property sold, the assets marshalled, and the priorities of the parties determined. And failing in these main purposes, the bill seeks to have the amounts alleged to be due to Carter and Huckabee by the company, for the purchase-money of the lands on a re-sale, appropriated to the payment of the judgments of complainants. No question as to the character of the bill is raised by the demurrer.

It is a general rule, that all persons who are legally or beneficially interested in the subject-matter of the suit—who have a legal or equitable estate, and whose rights and interests are to be affected, or sought to be concluded by the decree—are necessary parties to the bill. It is manifest from the allegations of the bill, that Glover, John Collins and Carter are, each, either legally or beneficially interested in the subject-matter of the suit, and that their rights and interests would be materially affected by a decree in favor of complainants. The bill shows that, after the making of the mortgage to Walton, the company executed, in April, 1867, a mortgage to Glover, and another mortgage, in May, 1867, to John Collins, all three covering the same property, and conveying substantially all the property of the company: that, subsequently to the execution of the deed of trust to Pettus and Jones, the property was sold under the Walton mortgage, and purchased by the then beneficial owners of the mortgage, who conveyed to Huckabee for the purpose of enabling him to effect a sale of the property; that Huckabee afterwards sold a part of the lands to Carter and Sheppard, who re-sold to the company, for which the company is still indebted to Carter and Huckabee respectively. It is thus shown that Glover and Collins are mortgagees, invested with whatever right and title the company held, at the time their mortgages were executed, to the property sought to be subjected to a lien in favor of complainants, claimed to be superior, or to be sold and the proceeds distributed among the creditors according to

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their equities, under the operation of the Walton mortgage as a general assignment; and that the complainants claim to have the amount due by the company to Carter appropriated to the satisfaction of their judgments. It is true, no special relief is prayed against Carter, *eo nomine*; but the bill alleges the facts, on which such application of the money may be claimed under the general prayer.

When the allegations of the bill show that, at some prior time, persons who are not made parties, had an interest which would be materially affected by the decree, its continuance is presumed; and it is incumbent on the complainant, if he would be relieved of the necessity to make them parties, to show by appropriate averments a cessation of the interest. It is not necessary, as counsel insist, for the demurrant to show that such person has never parted with his interest, in order to avail himself of the objection of a want of necessary parties. By alleging the interest or facts, that make it apparent, the complainants make a *prima facie* case against themselves. The averment that some other person, who is made a party, claims to be the owner of the mortgage, is not sufficient. The person having the legal title, though he may not have a beneficial interest, must be made a party, so that the legal title may be bound by the decree. When a bill is brought by the assignee of a judgment or *chose in action*, the assignor, or other person having the legal title, must be made a party, and no decree will be rendered in his absence.—*Lawson v. Ala. Warehouse Co.*, 73 Ala. 289. To dispense with the necessity of making a mortgagee of real estate a party, the bill must show that his interest and title to the land has passed out of him, by an instrument containing apt and appropriate words of conveyance; and it will not be seriously contended that the money claimed by Carter can be taken from him, and applied to the demands of complainants, without giving him an opportunity to contest, and show his right to the money.

It is well settled by the decisions of this court, that, under our statutes, a judgment has no lien on the property of the defendant, real or personal.—*Dane v. McArthur*, 57 Ala. 448; *Carlisle v. Goodwin*, 68 Ala. 137. The issue of an execution, and its delivery to the sheriff, are necessary to create a lien, which continues until there occurs the lapse of an entire term without another having been issued.—Code, § 3210. Where the lien, which was originated by the issue of an execution, is lost, by suffering an entire term to lapse without the issue of another, it requires a new execution to create a lien, which, "in such case, will be a new lien, not a revivor of the last lien"—a new lien, commencing from the time the new execution is received by the sheriff.—*Gamble v. Fowler*, 58 Ala. 576.

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The levy of the last execution on lands does not obviate the effect of a failure to have successive issues, as required by the statute. An execution lien on land constitutes no property or right in the land itself. Speaking of a judgment lien, it has been said: "It only confers a right to levy on the same, to the exclusion of other adverse interests subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor for this purpose relates back to the time of the judgment, to cut out intermediate incumbrances. Subject to this charge, the defendant may convey the land. A judgment creditor has no *jus in re*, but a mere power to make his general lien effectual by following up the steps of the law. What law? The law which authorizes the judgment, and the issuing of the process, through which means the judgment may be satisfied. A failure to do this, releases the charge on the property."—*Massingill v. Downs*, 7 How. 760. A judgment, when an entire term has elapsed without the issue of an execution, is necessarily a judgment without a lien, until a new execution has been issued.

Section 3173 of the Code provides: "When execution has been issued on a judgment within a year after its rendition, and has not been returned satisfied, another execution may be issued at any time within ten years after the test of the last, without a revival of the judgment." And by section 3174: "If ten years have elapsed from the rendition of the judgment, without the issue of an execution, or if ten years have elapsed since the date of the last execution, the judgment must be presumed to be satisfied, and the burden of proving that it is not satisfied is cast on the plaintiff." At the common law, when the plaintiff delayed suing out execution beyond a year, the presumption arose that the judgment had been satisfied, or from some supervening cause it was not to have effect; and the plaintiff was not entitled to execution as of right, but was compelled to resort to an action on the judgment, or to the writ of *scire facias* to revive it, and call the defendant to show cause why execution should not issue.—*Bing. on Judg. & Ex.* 119. Our statute extends the time to ten years, before the presumption of satisfaction arises. It may be conceded, that an execution, issued after the expiration of ten years, is not void, but voidable at the instance of the defendants. The operation and effect of the statutes are, to deny the plaintiff the right to sue out an execution without a revival of the judgment.—*Van Cleave v. Haworth*, 5 Ala. 188; *Shackleford v. Miller*, 18 Ala. 675. When a judgment becomes inoperative, and an execution can not be legally and regularly issued thereon, and so continues until revived by proper proceeding, it is a dormant judgment.—*Freeman on Judg.* § 442.

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The lien of judgments rendered in the Federal courts is created by, and depends on the State laws, where Congress has not legislated on the subject. "In those States where the judgment, or the execution of a State court, creates a lien only in the county in which the judgment is entered, it has not been doubted that a similar proceeding in the Circuit Court of the United States would create a lien to the extent of its jurisdiction. This has been the practical construction of the powers of the courts of the United States, whether the lien was held to be created by the issuing of process, or by express statute." *Massingill v. Downs*, *supra*; *Ward v. Chamberlain*, 2 Blatch: 430. And by section 967 of the Revised Statutes, judgments rendered in a Circuit Court within any State "cease to be liens on real estate or chattels real, in the same manner, and at like periods as the judgments of the courts of such States cease by law to be liens thereon." No execution was issued on the judgments of complainants, for more than ten years after the date of the last execution; and on the foregoing principles, they are dormant, and without a lien.

The remaining cause of demurrer is, that the complainants do not show they are judgment creditors. The bill alleges, that the judgments mentioned therein were rendered by a court of competent jurisdiction, and are unsatisfied. The antecedent causes of action are merged in them, and they are conclusive of all pre-existing defenses. They are judgments, though dormant, and the complainants are dormant judgment creditors. But, as, under the rules we have stated, the complainants can obtain only the same relief to which simple-contract creditors, on the same facts, and under the same circumstances, would be entitled, the ruling of the court on this cause of demurrer is error without injury.

Other important questions have been elaborately and ably argued by counsel. As, however, they are not raised by the demurrer, and as they may be, in some respects, differently presented on a final hearing, a consideration of them will be premature.

The decree is affirmed, and the cause remanded, with directions to allow complainants, if they desire, to amend the bill, by making the necessary parties, and in such other respects as may be necessary and proper.

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Lee v. Lee.*Bill in Equity for Allotment of Dower, and Account of Rents and Profits.*

1. *Widow's right of dower, as affected by separate estate.*—To bar or reduce the widow's right of dower in her husband's lands, on account of other lands belonging to her in her own right (Code, §§ 2715-16), they must be held by her as a statutory estate, as distinguished from one that is equitable.

2. *Decree declaring lands to belong to married woman, "as her separate estate under the laws of this State;" whether estate is statutory or equitable.* Under a decree in a chancery cause, rendered in 1875 (before the decision in *Short v. Battle*, 52 Ala. 456, re-established the distinction between the statutory and equitable estates of married women), enjoining actions at law by purchasers at execution sale against the husband, and vesting the title to the lands in controversy in the wife, who was the complainant, "as her separate estate under the laws of this State;" these words "are of doubtful import on their face," and the court does not decide whether they create a statutory or an equitable estate; but they do not establish an intended change in the character of the complainant's estate, as shown by the pleadings and proof.

3. *Decree construed, as affected by consent and agreement of record.* A decree in a chancery cause, rendered under a submission on pleadings and proof, held the complainant, a married woman, entitled to relief; vested the lands in controversy in her, "as her separate estate under the laws of this State;" perpetually enjoined the defendants, purchasers at execution sale against her husband, from the further prosecution of their action at law, and then added: "And the defendants having agreed to assent to this decree, and to release all errors, as shown by their agreement hereunder written, it is by consent further ordered and decreed, that the complainant's next friend pay the costs of this suit," &c. The agreement was signed by the solicitors of both parties, and was in these words: "We hereby assent to the foregoing decree, and hereby release all errors." *Held*, that the agreement only extended to a release of errors on one side and the assumption of costs on the other, and did not show that the decree was rendered by consent, so far as it affected the character of the complainant's estate in the lands.

4. *Conveyance of lands to married woman; character of estate.*—A conveyance of lands to a married woman, without any words showing an intention to exclude her husband's marital rights, vests in her a statutory estate.

5. *Purchase of lands by husband, with wife's money; approval by court of voluntary act which it would have compelled.*—When lands are bought by the husband with moneys belonging to the separate estate of his wife, whether statutory or equitable, and the title taken in his own name, a court of equity will, at the instance of the wife, compel him to convey the property to her, by words creating the same estate as that by which she held the money, unless creditors or purchasers have acquired intervening rights; and if the husband does this voluntarily, the court will sanction and approve the act.

6. *Conversion of wife's equitable estate into statutory estate.*—Conceding that a married woman, owning an equitable estate, may intentionally

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convert it into a statutory estate; yet such conversion, intentionally made, is not shown by proof of the facts, that lands bought by the husband with moneys belonging to her equitable estate, title being taken in his own name, and afterwards sold under execution against him, were bought in her name, with other moneys belonging to her equitable estate, and conveyed to her by words not excluding his marital rights; nor by a decree in chancery, under a bill filed by her against subsequent purchasers at execution sale against her husband, by which the title is vested in her "as her separate estate under the laws of this State."

APPEAL from the Chancery Court of Perry.

Heard before the Hon. THOMAS COBBS.

The bill in this case was filed on the 15th September, 1879, by Mrs. Tabitha J. Lee, the widow of R. H. Lee, deceased; and sought an allotment of dower in certain lands, of which her said husband was seized and possessed during coverture, and which the several defendants claimed as purchasers and sub-purchasers under judicial sales against him, and an account of the rents and profits received or accruing after his death. Said Richard H. Lee and the complainant were married in July, 1855, and he died in November, 1878. The main defense against the asserted right of dower was, that the complainant owned other lands, of equal or greater value than her dower interest in her husband's lands; and this depended on the character of the estate held by her in those lands, of which she was in possession at the death of her husband, and at the time her bill was filed. The different conveyances constituting her chain of title, and the consideration of each as recited or shown, are described in the opinion of the court; and it is only necessary to state the following facts, in addition to the facts therein stated: The deed of the United States marshal to the complainant, as the purchaser at the sale under execution against her husband and others, was dated November 12th, 1868, and conveyed to Mrs. Lee, without the addition of any other words, "all the legal right, title, interest and claim, in and to said property," of the defendants in execution. The bill in chancery afterwards filed by the complainant against R. Foster and P. Lockett, subsequent purchasers at execution sale against her husband, the other pleadings in the cause, and the decree rendered, were offered in evidence by the defendants, for the purpose of showing that the complainant's estate in the lands was statutory. By her bill in that case, the complainant claimed a "separate estate" in the lands, not stating whether it was statutory or equitable, and stated the facts and conveyances under which her title accrued, substantially as they are stated in the opinion of the court in this case; and alleged that the sheriff's deeds to Foster and Lockett were clouds on her title. The prayer of the bill was, "that complainant's right, title and claim to said lot and said parcel of land, as her separate estate,

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may be recognized and protected by this honorable court, and, if her legal title to said property, as her separate estate, shall appear to be in any respect defective, that the same may, under the order and decree of this court, be perfected and secured to her;" that the sheriff's deeds to Foster and Lockett be cancelled, and they enjoined from the further prosecution of their actions at law; and for other and further relief under the general prayer. The chancellor's decree was rendered on the 30th April, 1875, and, after reciting that the cause was submitted on pleadings and proof, proceeded thus: "Upon consideration thereof, the court is of the opinion that the complainant is entitled to the relief prayed in her bill; and therefore, upon consideration thereof, it is ordered, adjudged, and decreed by the court, that the sale to said P. Lockett, made by the sheriff of Perry county on the 6th November, 1871, be, and the same is hereby, vacated, annulled, and set aside, and the sheriff's deed to said Lockett for the house and lot therein described be, and the same is hereby, set aside and annulled;" that the sale to said Foster be also set aside, and his deed be annulled and cancelled; that the action at law be perpetually enjoined; "that all right, title and claim, in and to the said house and lot and land above described, which may be in the said defendants, or any or either of them, be, and the same is hereby, divested out of them, and vested in the said Tabitha Lee, as her separate estate under the laws of this State. And the defendants having agreed to assent to this decree, and to release all errors, as shown by their agreement hereunder written; it is by consent further ordered and decreed, that the complainant's next friend, Thomas Curry, pay the costs of this suit, including the tax-fee for complainant's solicitors; and that, if the same be not paid within thirty days after the taxation of the costs by the register, execution may issue therefor." The agreement referred to, written beneath the chancellor's name, and signed by the solicitors of both parties to the cause, is in these words: "We hereby assent to the foregoing decree, and hereby release all errors."

On final hearing, on pleadings and proof, the chancellor held that the complainant was not entitled to any relief under her bill, because her estate in the lands held by her was statutory, and the lands were of greater value than her dower interest in her husband's lands; and he therefore dismissed her bill. The chancellor's decree is now assigned as error, together with his rulings on objections to evidence which require no notice.

JNO. F. VARY, for appellant.—The deed of gift for the slaves, executed to Mrs. Lee by her father, created in her an equitable separate estate, by the uniform decisions of this court,

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which were overruled by *Molton v. Martin*, 43 Ala. 651, and *Denechaud v. Berry*, 48 Ala. 591; and these decisions, which were themselves overruled by *Short v. Battle*, 52 Ala. 456, did not change or affect the character of her estate. No trustee being named in the deed, Mrs. Lee's husband became her trustee by operation of law; but he had no power or authority to change the character of her estate, his duty being to preserve and protect it.—1 Bishop on Married Women, §§ 800-02; *Short v. Battle*, 52 Ala. 456. When the husband purchases property with money in his hands belonging to his wife, taking the title in his own name, a trust results to the wife, which a court of equity will recognize and enforce, and which may be established by parol.—1 Perry on Trusts, 3d ed. §§ 85, 87, 127, 138, and authorities cited in note 5, on page 142; 1 Greenl. Ev. § 266, note 3. There can be no doubt that the money paid for the property at the marshal's sale, being part of the debt due to Mrs. Lee on account of the hires of her slaves, belonged to her equitable estate; and if the marshal's deed uses words which would create in her a statutory estate, they can not be allowed to have that effect, since the facts show that she never intended to change the character of her estate; and the subsequent conveyance by her husband, executed in voluntary recognition of a duty and a trust which the court would have enforced against him, vests in her an equitable estate.—*Warren & Burch v. Jones*, 68 Ala. 449; *Cahalan v. Monroe*, 70 Ala. 271; *Goodlett v. Hansell*, 66 Ala. 151; *Helmetag v. Frank*, 61 Ala. 67; *McMillan v. Peacock*, 57 Ala. 127.

The character of this estate is not changed, as the chancellor held, by the decree in chancery rendered in the suit against Lockett and Foster. A judgment or decree is conclusive only on the question put in issue and decided.—*Ford v. Ford*, 68 Ala. 144; *Davidson v. Shipman*, 6 Ala. 27; *Boswell v. Carlisle*, 70 Ala. 249; *Johnston & Stewart v. Riddle*, 70 Ala. 226. At the time when Mrs. Lee's bill in that case was filed, and when the decree was rendered, the decisions of this court, above cited, recognized no distinction between equitable and statutory estates, but held both governed by statutory provisions; and whether the complainant's estate was equitable or statutory, was immaterial to the relief prayed and granted. Nor can any weight be attached to the agreement of counsel attached to the decree, as showing that the decree was rendered by consent, and therefore as evidencing an intentional and voluntary change in the character of the complainant's estate. The decree was rendered on pleadings and proof, and disposed of the case on its merits; and the agreement was evidently added afterwards, to stop the litigation, one party assuming the costs, and the other releasing errors.

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JNO. P. TILLMAN, and with him PETTUS & DAWSON, *contra*. (1.) The bill is for dower merely, and no fact is averred, or relief prayed, looking to a reformation of any of the conveyances through and on which the complainant bases her claim. Her right to relief, then, does not depend upon any equitable trusts or interests which she might, in another proceeding, assert against the lands, but upon the nature and character of the estate vested in her by the several muniments of title. (2.) Prior to the purchase at the marshal's sale, Mrs. Lee had no estate whatever in the lands, though she may have had an equity on account of the use of her funds in the payment of the purchase-money, while the legal title was taken in the name of her husband.—*Bolling v. Mack*, 35 Ala. 727; *Evans v. English*, 61 Ala. 416; *Holley v. Flourney*, 54 Ala. 99; *Prince v. Prince*, 67 Ala. 569. This equity could not prevail against a *bona fide* purchaser from the husband, nor against an execution lien acquired without notice.—67 Ala. 569; *Preston v. McMillan*, 58 Ala. 84. The marshal's deed vests in her, as the purchaser at the execution sale, a statutory estate, the nature of which can not be affected, in this proceeding, by the character of the funds used in paying for it, or her intention in making the purchase. The deed creates and determines her estate, and without it she would have none.—*Wheeler v. Walker*, 64 Ala. 560. (3.) The character of this estate is not changed by the conveyance executed to the complainant by her husband, nearly two years after the sale under execution. Whatever interest he had in the lands, except the statutory right of redemption (which is a mere personal privilege, and can not be assigned), passed to her under the marshal's deed; and according to her theory, he never had any beneficial interest whatever. (4.) Whatever doubt existed, if any, as to the nature and character of the complainant's estate in the lands, is removed by the terms of the chancery decree vesting the title in her "as her separate estate under the laws of this State." One of the purposes of the bill in that case was to ascertain and determine the character of her estate. All the facts pertaining to her title were before the court: she set up the several deeds, creating estates apparently of different characters, and prayed that her estate might "be perfected and secured to her;" and a consent decree was entered, by which she is concluded.

STONE, C. J.—The bill in this case was filed by Mrs. Lee, and its purpose is to have dower allotted to her in two tracts of land, described in the pleadings. The bill avers that, during the coverture, her husband, Richard H. Lee, was seized in fee of the entire interest in six hundred and forty acres of land, known as the "Prairie place," and of an undivided half in-

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terest in another tract, containing about eighteen hundred acres, known as the "Muckle place." Each of the tracts of land is described by Government-survey numbers. It is not controverted that complainant has fully established her claim to dower in each of the tracts, looking alone to her side of the case. All the affirmative conditions—marriage, seizin of the husband during the coverture, and his death—are fully proved. The lands were aliened during the life of the husband, and the wife did not join therein.

Much parol testimony was taken in the court below, and many exceptions were filed to parts of it. Large part of the testimony of complainant herself was objected to, and to some extent these objections are well founded.—*Gordon v. Tweedy*, 71 Ala. 202. There is other testimony to which exceptions were well taken, but it is not our intention to pass on the many exceptions. Enough legal testimony remains to establish the facts hereinafter stated.

The defense relied on in bar of complainant's right of dower is two-fold: First, that the lands were partnership property, owned by Richard H. Lee and James Lee as partners, and that they were sold in payment of partnership liabilities. This defense is properly abandoned by defendants, for the proof is insufficient to make it good.

The second defense pleaded and relied on in bar of complainant's claim of dower is, that at the time of the husband's death, and at the time complainant filed her bill in this cause, she had and owned a separate estate of equal or greater value than her dower interest in her husband's estate. There was no personal estate, of which the record gives any notice.—Code of 1876, § 2715. To bar dower, the separate estate owned by the widow must be statutory.—*Williams v. Williams*, 68 Ala. 405; *Harris v. Harris*, 71 Ala. 536. There is no question in this case that Mrs. Lee owned, and still owns, a separate estate equal in value to the dower interest she claims in lands which had been her husband's. The disputed question is, whether that estate is equitable or statutory.

In 1856, Curry, father of Mrs. Lee, gave to her a lot of slaves—the gift evidenced by deed executed and delivered—"to have and to hold in her own right and title, and for her own sole use and benefit, and the proceeds arising from their labor for her own sole use and benefit, free from the liabilities and debts of her husband, Richard H. Lee, or any future husband she may have; . . . as a separate and independent estate, from any estate of her present husband, Richard H. Lee, or any future husband she may have." Richard H. Lee and James Lee, his brother, were farming together in partnership; and the proof shows that Mrs. Lee's slaves, with the assent and

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approbation of Mr. Curry, her father, were hired to said Richard H. and James Lee, and were worked by them in their joint planting operations, until they were emancipated,—about nine years. The only proof offered on the subject shows that the hire of the slaves was worth annually eight hundred and fifty dollars. No price for the hires had been agreed upon, but it was to be a reasonable hire. The hires were not paid, but were allowed to accumulate, as a debt due from the two brothers. In 1865, there was paid to the complainant, on account of said hires, thirty-two bales of cotton, the property of the two brothers, which, being sold, yielded fifty-eight hundred dollars; which sum, by agreement, she was to, and did allow, as a credit on her said claim for negro hire. Before that payment, there was due to her, if interest be computed, over ten thousand dollars, according to the valuations fixed by the testimony.

In November, 1865, Mrs. Lee, complainant, negotiated for the purchase of a residence, with about twenty-four acres of ground attached, lying contiguous to the town of Marion, and known as the "Talbird place," at the purchase price of sixty-five hundred dollars. Boone was the owner at that time, and R. H. Lee, husband of complainant, attended to paying the money, and receiving the title. He paid for the property with the proceeds of the cotton, and furnished the residue of the purchase-money, something over six hundred dollars. He took the title from Boone and wife to himself. Lee and wife immediately took possession, and she is still in possession, claiming in her own right.

In July, 1868, one Tutt, in consideration of eighteen hundred dollars, sold and conveyed to Richard H. Lee a tract of land of about seventy acres, adjoining the said "Talbird place;" and since then the two places have been occupied and possessed as one. In November, 1868, both places—the "Talbird place" and the "Tutt place"—were sold by the United States marshal, and were purchased by complainant, and title made to her, without any words excluding the marital rights of her husband. The money, something over twelve hundred dollars, used in this purchase, was furnished by James Lee, also in part payment of the liability for the hire of complainant's slaves, as above set forth. In 1870, Richard H. Lee made a direct conveyance to his wife, the complainant, of the Talbird and Tutt tracts of land, conveying to her, without words of exclusion, said two tracts of land, and his statutory right to redeem the same. This deed is upon the recited consideration of forty-five hundred dollars, part of the liability for the hire of complainant's slaves, described above. We have made a rough calculation of the sum due for negro hire, according to



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the testimony; and adding interest computed by statutory rule, there was due to her, at the time this deed from her husband was made, between four and five thousand dollars. The highest valuation placed on the entire property, at the time the testimony was taken in this cause, fixes it at less than the first purchase price of the Talbird property. It was probably worth, at the commencement of this suit, between three and four thousand dollars.

Subsequent to the deed by R. H. Lee to his wife, the property was again levied on and sold under executions against Richard H. Lee; and Lockett and Foster became the purchasers. They instituted an action of ejectment to recover the property, and thereupon Mrs. Lee, by bill for the purpose, enjoined the prosecution of that suit, claiming that the property was hers. The bill, answer, and decree of the chancellor in that cause, were put in evidence by the defendants in this cause. The chancellor decreed in favor of Mrs. Lee, holding that the property was her separate estate, but without employing any words of exclusion, as to the marital rights of the husband. This, so far as that nuntment of title is concerned, tends to show, as the deed of the marshal did, that her title was statutory. That decree was rendered in 1875, and, after perpetually enjoining the ejectment suit, divesting all title out of the plaintiffs therein, decreed the property to "the said Tabitha Lee, as her separate estate under the laws of this State."

For reasons hereafter stated, we consider it unnecessary to decide whether the language of this decree, unexplained, vested in Mrs. Lee a statutory or equitable estate. The decision of that question, in that suit, was not rendered necessary, either by the averments in the pleadings, or by the wants of the litigation. The words are of doubtful import, and need not be interpreted.

Nor do we think there is any thing in the recited agreement in the last paragraph of the decree, which affects the question we are considering. The whole decree, except the last paragraph, demonstrates that it was not a consent decree on the merits. The last paragraph, and the consent, show their extent and purpose. They must have been added after the decree had been rendered and was known. It evidences an agreement to waive errors on one side, and to assume costs on the other. Why waive errors, if the whole decree was by consent? *Consensus tollit errorem.*—*Moon v. Crowder*, 72 Ala. 79.

In the summary of facts given above, we have the case of property—real estate—purchased and paid for with moneys which were Mrs. Lee's equitable separate estate, and the title taken in such form as to evidence a statutory separate estate. And the question arises, can this be set up in this chancery

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suit, in avoidance of the bar relied on by defendants to complainant's claim of dower? If this were a suit in a law court, which can only look at the legal titles, there is no question that the marshal's deed invested Mrs. Lee with a statutory estate in the Talbird and Tutt lands.—*Short v. Battle*, 52 Ala. 456; *Lee v. Tannenbaum*, 62 Ala. 501; *Evans v. English*, 61 Ala. 416; *Parsons v. Woodward*, 73 Ala. 348.

We have many rulings which, it is contended, bear on this question. It is settled, that if the moneys of the wife, her statutory separate estate, be invested for her, and the title taken in her name; or, if the purchase be of personal property, and no paper title taken, such property becomes the statutory separate estate of the wife.—Code of 1876, § 2709; *Coleman v. Smith*, 55 Ala. 369; *Harden v. Darwin*, 66 Ala. 55; *Smith v. Whitfield*, 71 Ala. 106; *Harris v. Harris*, *Ib.* 536; *Daffron v. Crump*, 69 Ala. 77. We have held, however, that if the *corpus*, other than money, of the wife's statutory estate, be exchanged for other property, without instrument in writing signed by husband and wife, and witnessed and acknowledged as the statute prescribes, the wife does not acquire a title to the property obtained in the exchange.—Code, §§ 2707–8; *Evans v. English*, 61 Ala. 416; *Pollak v. Graves*, 72 Ala. 347. So, we have held, that the natural increase of domestic animals, property of the wife's statutory estate, is itself her statutory separate estate—applying the maxim, *partus sequitur ventrem*. *Gans v. Williams*, 62 Ala. 41; *Walker v. Ivey*, 74 Ala. 475. And the rents and profits of the wife's equitable separate estate belong to her, unless she act in such way as to raise the presumption of a gift to her husband.—*Roper v. Roper*, 29 Ala. 247; *Gordon v. Tweedy*, 71 Ala. 202; *Allen v. Terry*, 73 Ala. 123; *Crockett v. Lide*, 74 Ala. 301.

There is a remaining question: If the moneys of the wife be invested in property, and title taken in the husband, chancery will compel him to convey the property to her, unless the rights of purchasers or creditors have accrued, without notice of the wife's equity.—*Preston v. McMillan*, 58 Ala. 84. And the title by which she held the money or means thus invested, will determine the nature of the title chancery will clothe her with.—*Coleman v. Smith*, 55 Ala. 367. And the husband, being compellable thus to convey to her, may voluntarily do what he could be thus compelled to perform. Chancery sanctions and approves as well done any voluntary act of which it would compel the performance.—*Wilson v. Sheppard*, 28 Ala. 623; *Harden v. Darwin*, 66 Ala. 55; *Goodlett v. Hansell*, *Ib.* 151.

It may be contended, that this is not the case of a transmutation of a statutory into an equitable separate estate, which was

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the case in *Coleman v. Smith*, 55 Ala. 367. Mrs. Lee's estate was equitable, and the contention is, that it has been changed into a statutory estate, by her own conduct; that, as to such equitable estate, she has the powers of a *femme sole*, and may charge, or change it at pleasure, and may, with the concurrence of her husband, dispose of it as she chooses, even to the extent of giving it to her husband. Without intending to decide this question, we may concede, for the purposes of this opinion, that she had such power. Is there enough in this record to show us she intended to make such change in the *status* of her estate? Do not the circumstances strongly tend to repel such conclusion?

The change contended for is certainly a radical one. An equitable separate estate is much the more valuable of the two, for over it the wife's power is much greater, and the husband's much less, than over a statutory estate. In the former, the husband has no interest, save as the wife may give it to him. It can not be charged, unless the wife by her own contract charge it. Of the latter, the husband is trustee, and receives and administers the incomes and profits, without liability to account; and the *corpus* may be charged with debts, even of the husband's contracting, for the "comfort and support of the household," &c. Other differences might be pointed out. The purchase at marshal's sale was made, and the conveyance taken, when Mrs. Lee was not present; and there is neither averment nor proof that either her attention, or that of her husband, was called to the fact, that the deed wrought a radical change, *prima facie*, in the *status* of her estate.

The chancellor's decree, referred to above as vesting in Mrs. Lee a title to the property, "as her separate estate under the laws of this State," was rendered April 30, 1875. At that time, and for years before, according to the rulings of this court as theretofore constituted, the deed from her father under which she claimed, although containing strong words of exclusion, nevertheless clothed her with a statutory separate estate.—*Molton v. Martin*, 43 Ala. 651; *Glenn v. Glenn*, 47 Ala. 204; *Denechaud v. Berry*, 48 Ala. 591. These rulings stood as the law of the land when the chancellor rendered said decree, April 30, 1875. Well might the chancellor pretermitt all expression of the character of Mrs. Lee's estate, when, by the accepted utterances of this court, the separating line between the two classes of separate estates had been obliterated. The decisions referred to were overruled in *Short v. Battle*, 52 Ala. 456, decided at the June term, 1875. The effect of that ruling was the re-establishment of the two classes of separate estates, which had been recognized since the adoption of the Code of

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1852. We can not think this record shows an intention to change Mrs. Lee's estate from equitable to statutory.

Another phase of this question. Conceding that, after Mrs. Lee's purchase at the marshal's sale, her title, until reformed, was statutory, this clothed her husband with only the naked legal trust, with the right to administer the trust fund without liability to account for the rents, incomes and profits; and when her husband subsequently conveyed to her, did he not thereby renounce, in her favor, any and all right he may have had as her statutory trustee, and thus did only what chancery, on the facts of this case, would have compelled him to do? Did she not thereby become clothed with the title to the property, in the same right as that by which she held the money with which it was purchased?—*Goodlett v. Hansell*, 66 Ala. 151; *Harris v. Harris*, 71 Ala. 536. These lands oppose no bar to Mrs. Lee's right of dower.

Reversed and remanded.

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Action on Official Bond of Probate Judge.

1. *Action against judicial or ministerial officer.*—A civil action does not lie against a judge, for doing, or omitting or refusing to do, an official act in the exercise of judicial power; but, if he is also charged with the performance of ministerial duties, he is responsible to any person specially injured by the manner in which he performs them, or by his neglect or refusal to perform them, and his judicial character does not protect him.

2. *What acts are judicial, and what ministerial.*—Judicial power is authority to hear and determine, where the rights of persons or property, or the propriety of doing an act, is the subject-matter of adjudication, and a judicial act involves the exercise of judgment or discretion; but, where the law enjoins a duty, prescribing and defining the time, manner and occasion of its performance, with such certainty that nothing remains for judgment or discretion, the duty and the act each is ministerial.

3. *Same; granting or refusing license to retail spirituous liquors.*—In granting or refusing a license to retail spirituous liquors, a probate judge acts ministerially, not judicially; and an action lies on his official bond, if he improperly refuses to issue a license to an applicant who has fully complied with all the statutory requisitions.

4. *Judicial knowledge of statute, and election held under it.*—The court will take judicial notice of the act approved March 19th, 1875, known as the "Local Option Law" (Sess. Acts 1874-5, p. 276), and of the counties to which it is applicable; but not of an election held under its provisions in any one of those counties, nor the result thereof.

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APPEAL from the Circuit Court of Jackson.

The record does not show the name of the presiding judge.

This action was brought by William M. Grider, against John B. Tally and others, the sureties on his official bond as the probate judge of said county; and was commenced on the 9th November, 1881. The complaint set out the bond, which was dated the 24th August, 1880, and conditioned that the said Tally "shall faithfully discharge the duties of such office, during the time he continues therein, or discharges any of the duties thereof;" and alleged, as a breach, that on the 21st December, 1880, plaintiff filed his petition to said Tally, as probate judge of said county, praying for a license to sell liquor in the town of Belleforte, "having first complied with all the requirements of the law in relation to the granting of license for the sale of liquor;" that said Tally "wrongfully and unlawfully refused to issue a license to plaintiff;" that plaintiff then applied to Hon. H. C. SPEAKE, the presiding judge of the circuit, for a *mandamus* requiring said Tally to issue a license as prayed, and obtained a peremptory *mandamus*; that Tally sued out an appeal to this court from said order of Judge SPEAKE, and said order was affirmed by this court; that plaintiff thereupon again applied to said Tally to grant him a license, "according to the prayer of his petition and the judgment of said court, and said Tally again wrongfully and unlawfully refused to issue a license;" that plaintiff thereupon prayed and obtained from Judge SPEAKE an attachment, directing the sheriff of said county to take said Tally into his custody, and him safely keep until he issued a license as prayed; whereupon said Tally did issue a license to plaintiff as prayed in his said petition. Plaintiff avers, that by reason of the wrongful and unlawful refusal of said Tally to issue said license, he was put to great trouble and expense in procuring the several judgments of the courts, whereby he was greatly damaged, to-wit, in the sum of \$200, and, by reason of the delay in obtaining his license, sustained great loss in his business," &c.

The court sustained a demurrer to the complaint, on the ground that, on the facts alleged, the probate judge was acting in a judicial capacity, and therefore no action would lie for an erroneous decision by him; and the plaintiff declining to amend, rendered judgment for the defendant. The judgment on the demurrer is now assigned as error.

D. D. SHELLBY, for appellant.

ROBINSON & BROWN, *contra*. (No briefs on file.)

CLOPTON, J.—It is an unquestioned rule, founded on the

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public benefit, the necessity of maintaining the independence of the judiciary, and its untrammelled action in the administration of justice, that a judge can not be held to answer in a civil suit for doing, or omitting or refusing to do, an official act in the exercise of judicial power. His responsibility for the manner in which he discharges the high trusts committed to him is to the sovereignty from whom he derives his authority. It is, also, an undisputed rule, that an officer who is charged with the performance of ministerial duties, is amenable to the law for his conduct, and is liable to any party specially injured by his acts of *misfeasance* or *nonfeasance*. When the law assigns to a judicial officer the performance of ministerial acts, he is as responsible for the manner in which he performs them, or for neglecting or refusing to perform them, as if no judicial functions were intrusted to him. The boundary of his judicial character is the line that marks and defines his exemption from civil liability.

Our law, organic and statutory, confers on the probate judge large judicial powers, and there is also assigned to him the performance of many acts merely ministerial; he is both a judicial and a ministerial officer. In *Thompson v. Holt*, 52 Ala. 491, it is observed: "A bond was, by legislation, demanded from him, as a guaranty for diligence and fidelity in the performance of his ministerial duties; as it is exacted from other mere ministerial officers. It is not a guaranty for his integrity and fidelity as a judge. For this, no other security is demanded from him, than that demanded from all other judicial officers—his official oath, and the sense of responsibility which the power and dignity of the office inspire. The official bond stands as an indemnity against his errors, or his willful misconduct, as a ministerial officer only. . . . For that which he may do or omit as a judge, he is exempt from civil suit or indictment. The policy of the State, founded on a due regard for the interests of the community, expressed in legislation which began in the days of our territorial existence, and which has been enlarged as public necessity demanded, has required of a probate judge an official bond, with sufficient sureties, conditioned in legal effect for the faithful performance of his ministerial duties, as a condition precedent to his induction into the office."

The official bond being a guaranty and conditioned for the faithful discharge of duties ministerial in their character, the inquiry addressed to our consideration is, whether the probate judge, in the matter of refusing to issue a license to the plaintiff, acted in a judicial or a ministerial capacity.

Judicial power is authority, vested in some court, officer or person, to hear and determine, when the rights of persons or property, or the propriety of doing an act, are the subject-

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matter of adjudication. Official action, the result of judgment or discretion, is a judicial act. The duty is ministerial, when the law, exacting its discharge, prescribes and defines the time, mode and occasion of its performance, with such certainty that nothing remains for judgment or discretion. Official action, the result of performing a certain and specific duty arising from fixed and designated facts, is a ministerial act.—*Flournoy v. City of Jefferson*, 17 Ind. 169; *Tenn. & Coosa R. R. Co. v. Moore*, 37 Ala. 371; *Morton v. Comp. Gen.*, 4 S. C. 430; *Commissioner v. Smith*, 5 Tex. 471; *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291. The inquiry should be directed to the question, does discretionary power attach to the office—the authority to decide, whether the license should or should not be granted?

Section 1544 of the Code provides: "No license must be granted to sell vinous or spirituous liquor, unless the applicant produce to the judge of probate of his county, or to the person authorized by law to grant such license, the recommendation of ten respectable freeholders and householders thereof, residing within four miles of such applicant, stating that they are acquainted with him, that he is possessed of good moral character, and is in all respects a proper person to be licensed." The succeeding section prescribes the oath, which the applicant must take and subscribe before license is granted; which oath may be administered by any officer authorized to administer oaths; and section 491 makes it the duty of the probate judge to issue the license upon payment of the amount required by law to be paid. Blank licenses are furnished by the auditor, to be filled and signed by the probate judge. No power is conferred on the probate judge to pass on the moral character of the applicant, or whether he is a proper person to be licensed, or on the propriety of issuing a license. He adjudges nothing—decides no question. On the production of the proper recommendation, taking and subscribing the prescribed oath, and paying the requisite amount, it is the clear and specific duty of the probate judge to issue the license.

If it be said, that the probate judge has to ascertain that the recommendation is by the freeholders and householders of the county, residing within five miles of the applicant, a similar necessity exists in every case of a ministerial duty. A sheriff must determine whether process, coming into his hands, is issued from a court of competent jurisdiction, and is regular on its face; and a treasurer of public moneys must ascertain whether the warrant is drawn by such officer, and in such manner that its payment is a duty; but the execution of the process, and the payment of the warrant, are ministerial acts. A judge must determine whether a judgment is entered accord-

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ing to the verdict of the jury; or the consideration of the court, and whether a bill of exceptions correctly recites the proceedings; but the act of signing the judgment and bill of exceptions is ministerial. That a necessity may exist for the ascertainment, from personal knowledge, or by information derived from other sources, of the state of facts on which the performance of the act becomes a clear and specific duty, does not operate to convert it into an act judicial in its nature. Such is not the judgment, or discretion, which is an essential element of judicial action.—*Crane v. Camp*, 12 Conn. 464. If the probate judge acts judicially in the matter of issuing a license, his decision is final and conclusive, and a license issued to a relative, within the degrees that disqualify a judge, is void.—*Halso v. Seawright*, 65 Ala. 431.

An appropriate and general test is laid down in *Rains v. Simpson*, 50 Tex. 495, as follows: "Perhaps as safe criterion as any other, to ascertain whether a private suit will or will not lie, is to adopt the rule which governs in cases in which a *mandamus* would or would not be granted." On the refusal of the probate judge to issue the license, when first applied for, the plaintiff made application to the Circuit Court for a *mandamus*, commanding him to issue it. A peremptory *mandamus* was granted by the Circuit Court, and on appeal to this court, the judgment was affirmed.—*Tally v. Grider*, 66 Ala. 119. The character of the specific act asked to have performed was necessarily involved in the issue, and determined. This is manifest, when it is observed that a *mandamus*, issued to an officer in a matter in respect to which he has discretionary powers, requires him only to take action, without directing the manner in which his discretion shall be exercised; but, when the act is merely ministerial, and its performance mandatory, the officer having no discretion, the *mandamus* requires and commands the doing of the specific act. If the duty of the probate judge is judicial—if he possesses discretionary power to issue or not to issue a license—a *mandamus* would not, and could not have been granted. The probate judge having already taken action and refused, a *mandamus* would have had no office to perform. Awarding a peremptory *mandamus* is a judicial ascertainment that the probate judge has no discretionary powers.

It may be proper to observe, that our consideration has been directed to the nature of the power and duty of the probate judge under the general laws providing for and regulating the issue of license to sell vinous or spirituous liquor. While we judicially know the act, commonly called the "Local Option Law," passed in 1875, and that it is applicable to Jackson county, on demurrer to the bill of complaint, which does not

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aver, nor make any allusion to any proceedings under the act, we can not take judicial notice that an election has been ordered and held as provided, or of its result. An expression of opinion, on the assumption that an election has been ordered, and held with a prohibitory result, would be premature, and mere *dictum*.

Reversed and remanded.

Bonner v. Phillips.

Statutory Real Action in nature of Ejectment.

1. *Certificate of register of land-office.*—A certificate made by the register of the land-office at Montgomery, which simply states that “*the records of said land-office show that, on August 11th, 1855, Sarah Presnall entered at St. Stephens, Alabama,*” a tract of land particularly described, is the mere statement of a conclusion by the officer, not a certificate issued under authority of any act of Congress (Code, § 3043), and is not competent evidence for any purpose.

2. *Public lands; judicial notice of, and exemption from taxation.*—The court judicially knows that all the lands in this State originally belonged to the United States, and were not subject to taxation until sold.

3. *Same; title of patentee, as against adverse possessor and purchaser at tax-sale.*—Where the plaintiff claims title under a patent issued to him within three years before the commencement of the action, and there is no evidence of any prior claim or act of ownership by any person claiming under the United States, the defendant can not defeat a recovery by setting up his adverse possession, or his purchase at tax-sale, prior to the date of plaintiff's patent.

APPEAL from the Circuit Court of Clarke.

Tried before the Hon. WM. E. CLARKE.

This action was brought by Mrs. Sarah Phillips (formerly Sarah Presnall), against John Bonner, to recover the possession of a tract of land, which was described in the complaint as “the south-east quarter of the south-east quarter of section twenty-five (25), of township eight (8) north, range four (4) east,” with damages for its detention; and was commenced on the 6th October, 1883. The defendant pleaded not guilty, adverse possession for more than three years before the commencement of the suit, and a purchase at tax-sale more than five years before the commencement of the suit; and the cause was tried on issue joined on these several pleas. On the trial, as the bill of exceptions shows, the plaintiff offered in evidence a patent from the United States, which was dated November, 1880, and by which the land in controversy was conveyed to Sarah Presnall; and she then proved by her son, Brunson Phillips,

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her identity with Sarah Presnall. Said witness further testified, "that plaintiff had exercised no control over the land in controversy since it was sold for taxes in 1868, and that James Stabler, the purchaser of the land at said tax-sale, or his vendee, said defendant, went into the possession of said land about the year 1870, or 1871, and had been in uninterrupted possession ever since, exercising acts of ownership over it." The defendant then offered in evidence a deed executed by the probate judge of the county, dated May 10th, 1871, by which the land was conveyed to James Stabler, as the purchaser at a sale for unpaid taxes made in March, 1868; which deed recited that the land was sold for the unpaid taxes of the year 1864, and that it was assessed that year against "owner unknown." It was admitted that Stabler went into the possession of the land under this deed, in 1870, or 1871, and sold and conveyed to the defendant, by deed dated December 16th, 1876, which was produced and proved; and it was proved that said Stabler or the defendant had held continuous and uninterrupted possession from that time until the commencement of this suit. The defendant then offered in evidence a certificate dated "United States Land Office, Montgomery, Ala., March 27th, 1884," and signed "*Thomas J. Scott, Register*," which was in these words: "I, Thomas J. Scott, register of the U. S. land-office at Montgomery, Ala., do hereby certify, that the records of the late land-office at St. Stephens, Ala., land-office show that, on August 11th, 1855, Sarah Presnall entered at St. Stephens, Ala., the S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 25, in township 8 N., of range 4 east, St. Stephens principal meridian, containing 36.825 acres, for which she paid at the rate of 12.50 cents per acre, amounting to \$4.60." The court excluded this certificate, on objection by the plaintiff, and the defendant excepted. This being all the evidence, except some evidence as to the regularity of the sale for taxes, the court charged the jury, on request, that they must find for the plaintiff, if they believed the evidence. The defendant excepted to this charge, and he now assigns it as error, together with the exclusion of the certificate as evidence.

JNO. Y. KILPATRICK, for appellant.

II. PILLEANS, *contra*.

STONE, C. J.—The certificate signed by Scott, register of the land-office, was not legal evidence. It was not a certificate made by him, constituting alike an official act done by him, and the evidence of it. Nor was it a certified copy from official records in his custody. It merely stated that the records in his

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office showed "that, on August 11, 1855, Sarah Presnall entered at St. Stephens, Ala., the S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 25, in township 8 N., of range 4 east, St. Stephens principal meridian," &c. This was, at most, the conclusion of the certifying officer, that the records in his keeping showed the alleged entry. This was in no sense a certificate issued pursuant to an act of Congress, and it does not come within the letter or spirit of section 3043 of the Code of 1876.—*Woods v. Nabors*, 1 Stew. 172; *Peebles v. Tomlinson*, 33 Ala. 336; *Jeanes v. Lawler*, *Id.* 340.

We judicially know that all the lands in this State belonged originally to the Government of the United States, and, until sold, were not subject to taxation. The only evidence found in this record that the title to the land in controversy ever passed out of the Government, is the patent issued to Sarah Presnall, now Phillips, bearing date in November, 1880. There is no proof that, before that time, she had ever asserted claim to the land, or exercised any acts of ownership over it. In the absence of all proof on the subject, we feel bound to presume the land remained the property of the United States, until Mrs. Phillips acquired title by the issue of the patent in November, 1880. This being the presumption, the land was not subject to taxation till then, nor could it be the subject of adverse holding. It follows that, under the proof found in this record, defendant can claim no benefit under the purchase at tax-sale, nor under his possession anterior to the issue of the patent. *Swann v. Lindsay*, 70 Ala. 507; *Swann v. The State of Alabama*, at this term.

Affirmed.

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Action against Railroad Company, for Injuries to Stock.

1. *Liability of railroad company, for injuries to stock; statutory provisions.*—The statutory provisions prescribing certain duties to be performed by railroad engineers "on perceiving an obstruction on the track of the road," making the railroad company liable for all damages to persons, stock or other property, resulting from a failure to comply with these requirements, and imposing on it, in an action for damages, the *onus* of proving compliance (Code, §§ 1699, 1700), only apply when there is an obstruction *on* the track of the road, against which the engine or train, running its proper course and direction, may strike, and it is perceived by the engineer; nor do the statutory duty and liability arise,

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when an animal suddenly springs on the track in front of the engine, in such close proximity that human appliances can not avoid a collision.

2. *Same, at common law.*—As to an animal running by the side of the track, though on the railroad's right of way, the duties of the engineer and the liability of the company for damages are to be determined by the principles of the common law, which require that the engineer should use the same care and diligence which a careful and prudent man, handling agencies of similar hazard and power, would use in the management of his own business; and the rule is the same, whether the animal is seen by the engineer, or is not seen because of his failure to observe proper watchfulness, so far as consistent with the performance of other duties equally imperative.

3. *Giving charge as requested; rule as to error without injury not applicable.*—Charges asked, if in writing, "must be given or refused in the terms in which they are written" (Code, § 3109); and when a charge asked is improperly refused, the doctrine of error without injury can not be invoked, because the court had already given a charge asserting substantially the same legal proposition.

4. *Impeaching witness; charge as to witness not being impeached.*—One mode of impeaching a witness is to disprove by other witnesses the facts stated by him; and hence, a charge asked, asserting that "there has been no attempt to impeach the veracity of this witness," is properly refused, when there is any other evidence from which a contradiction of his testimony can be inferred.

5. *Charge cautioning jury against prejudice or partiality, or couched in disrespectful language.*—While it is the duty of a juror to discard all prejudice or partiality, and to render a conscientious verdict without regard to consequences; and while it may sometimes be proper, or even necessary, that the presiding judge should impress upon the jury the necessity of a fearless discharge of this duty; yet a charge requested, assuming that they intend to disregard their oath and duty, or couched in language otherwise disrespectful to them, is properly refused.

6. *Ambiguous charge, or charge requiring explanation.*—A charge requested, which is ambiguous, or tends to confuse the jury, or requires explanation or qualification, is properly refused.

APPEAL from the Circuit Court of Lawrence.

Tried before the Hon. H. C. SPEAKE.

This action was brought by John W. Bayliss, against the appellant corporation, to recover damages for the killing of a horse belonging to the plaintiff, by the alleged negligence of the defendant's servants; and was commenced on the 10th December, 1881. On the first trial, the plaintiff had a verdict, on which judgment was rendered in his favor; but this judgment was reversed, on appeal sued out by the defendant, on account of the refusal of certain charges asked, and the cause was remanded.—75 Ala. 466-69. On the second trial, issue being joined on the plea of not guilty, the plaintiff again recovered a verdict and judgment; from which judgment the defendant now appeals, assigning as error several charges given by the court on the request of the plaintiff, and the refusal of several charges asked by the defendant. The facts disclosed by the evidence, so far as material to the questions now presented, were the same as on the first trial, and, briefly stated, were these: The plaintiff's horse was killed, on the morning of

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October 16th, 1881, by an engine and train of cars on the road of the Memphis & Charleston Railroad Company, which was then operated under a lease by the defendant corporation. The accident occurred about day-break, or a few minutes before, at a place nearly a mile distant from Town Creek station on said road, which the train was approaching. The train was fifteen or twenty minutes late, and was moving at the rate of thirty-five or forty miles per hour, as the engineer in charge testified; but he testified, also, that this was the regular schedule time. At the place where the dead body of the horse was found, and for some distance beyond, there was a fence on each side of the track. The tracks of the horse, as testified by the plaintiff's witnesses, showed that he had run in advance of the approaching train, for a distance of 150 or 200 yards, partly within the iron rails, and partly on the outside of the track; and that he was struck by the engine and killed, just opposite a gap in the fence on the south side, as he attempted to jump across the track. The engineer in charge of the train at the time, Thomas Kincella, was examined as a witness on the part of the defendant, and testified, in substance, that his head-light was at the time in good order and burning brightly, and was as good as any head-light in use on the road; that by its aid he could distinguish an object on the track one hundred yards ahead, but not further, and could not distinguish an object on either side of the track; that he was in the vigilant discharge of his duties at the time, and was keeping a sharp lookout ahead; and that he did not perceive the horse until he jumped on the track, just in advance of the engine, so near that it was impossible to reverse his engine, stop or check the train, or do anything else to avoid a collision.

This being the substance of the evidence, the court gave the following charges at the instance of the plaintiff: (1.) "If the jury believe, from the evidence, that the engineer did not see the horse until he sprung upon the track, and until it was too late to avert the accident, but that, if he had exercised a proper degree of watchfulness, he could have seen him in time to prevent the injury; then he was guilty of negligence, and the defendant would be liable." (2.) "If the jury believe, from the evidence, that the engineer, with a proper degree of watchfulness, would have seen the horse before he sprang on the track, and that his failure to do so was the result of a want of keeping a proper lookout, and that by keeping a proper lookout he would have seen the horse in time to prevent the injury; then the defendant is liable." (3.) "The jury can infer that the engineer did not keep a proper lookout, from circumstances as well as from facts; but such inference must be drawn from the evidence."

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The defendant excepted to each of these charges as given, and requested the following charges in writing:

"1. If the jury believe the evidence, they must find for the defendant.

"2 If the jury believe, from the evidence, that the engineer was at his post, and in the discharge of his duty, and was exercising that degree of diligence which very prudent persons observe in the conduct of their own business; then, simply because he failed to see the horse, when running on the side of the track, does not make the defendant liable for the accident.

"3. If the jury believe, from the evidence, that the horse ran between ninety and one hundred yards between the iron rails of the railroad, and was so running by reason of the train being behind time, and that the train was running at the rate of thirty-five or forty miles per hour; then it would have been a physical impossibility for the horse to have left the track after completing said ninety or more yards, and to have reached the place where he was killed before the train reached there.

"4. If the jury believe the evidence testified to by the witness Seay [a witness for plaintiff], if they find that he so testified, that an engineer, or other person on an engine, could not see by the aid of the head-light, on the side of the track, at a greater distance than eight or ten feet; if the jury believe this evidence, then, if they believe the uncontradicted evidence in the case, it was an impossibility for the engineer to stop his engine, running at the rate of thirty-five or forty miles an hour, within the space of less than 250 yards; and it was not necessary for the engineer to attempt the impossible in fact.

"5. If the jury believe, from the evidence, that the killing of the plaintiff's horse was an accident, which could not have been averted by the use of the utmost care and watchfulness on the part of the defendant's employees; then the jury can not render a verdict in favor of the plaintiff, without a willful disregard of their oaths, and a stigma upon their position in the jury-box as impartial jurors; and that their verdict, if so rendered notwithstanding their belief in such evidence, would be simply tyrannical confiscation.

"6. There has been no attempt in this case to impeach the veracity of the engineer, and the presumption is that he has sworn the truth. His evidence should be fairly and impartially weighed by the jury; by his intelligence, his manner, the consistency of his story, its probability or improbability, and all the other tests which do or do not convince; and if the jury, after applying all these tests, are convinced of the truth of his evidence, they have but one plain duty, and that is to render a verdict in favor of the defendant.

"7. The fact that the plaintiff is a citizen of Lawrence

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county, and has lost his horse by the defendant's train running against it and killing it, does not, in and of itself, under the evidence in this case, if the jury believe all the evidence, justify a verdict against the defendant.

"8. The testimony of the witness Kincella should be weighed by you, gentleman of the jury, fairly and impartially, applying all those legitimate tests by which a narrator does or does not convince. Each one of you is a sworn juror in search of truth, and should be blind to consequences. You have taken a solemn oath to try this case well and truly, and to render a true verdict according to the evidence. If you willfully disbelieve and disregard the evidence of this engineer, without having any just ground for so doing, your verdict for the plaintiff will be a false verdict, rendered with an utter disregard of your sworn duty.

"9. There is no room in the jury-box for prejudice or partiality; and I charge you, gentlemen of the jury, that you have no more right to render a verdict against the railroad by reason of prejudice against it, or to render a verdict for the plaintiff because of partiality for him, then you would have to steal one man's property to give it to another.

"10. If the jury believe, from the evidence, that when the plaintiff's horse went on the track of the railroad, the front of the engine was so near him that it was impossible, before the engine struck him, to stop the train, or sound the cattle-alarm; then the jury would, under this state of facts, be authorized to find for the defendant."

The court refused each of these charges, and the defendant duly excepted to their refusal. The bill of exception recites, in connection with said charge No. 2, that the court, before refusing it, had given a charge requested by defendant, in these words: "If the jury believe, from the evidence, that the engineer was at his post, and in the discharge of his duty, and was exercising that degree of diligence, attention and watchfulness, which very prudent persons observe in the conduct of their own business; then, if the jury also find, from the evidence, that he failed to see the horse while running on the side of the track, this would not make the defendant liable."

The charges given at the instance of the plaintiff, and the refusal of the several charges asked by the defendant, with other matters, are now assigned as error.

HUMES, GORDON & SHEFFEY, for appellant.

W. P. CHITWOOD, and J. C. KUMPE, *contra*.

CLOPTON.—The General Assembly, deeming the common-

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law rules insufficient for the ample protection of persons, stock, and other property, enacted statutes regulating and defining in certain cases the duties and liabilities of railroad companies. These statutes have been repeatedly examined and considered, and their construction may be regarded as well settled. Section 1699 of Code, after making it the duty of the engineer to give specified signals, on approaching, passing, and leaving designated places, provides: "He must, also, on perceiving any obstruction on the track of the road, use all means known to skillful engineers (such as the application of his brakes, and the reversal of his engine), in order to stop the train." The succeeding section (1700) makes the company liable for all damages to persons, stock or other property, resulting from a failure to comply with the requirements of section 1699; and when any stock is killed or injured, or other property damaged or destroyed, by the locomotive or cars, the burden of proof is on the company to show that the requirements of the statute were complied with.

The statute is a modification of the common law. The absolute duty to use all means to stop the train, on perceiving an obstruction on the track, did not exist independent of the statute. It might or it might not be a duty, according to the circumstances. In some conditions, safely consists in quickening the speed. The statute ought not to be extended by construction to cases not included in its clear and unambiguous terms, especially as a failure to comply with the requirements of the statute is made a misdemeanor. To originate the statutory duty, there must concur an obstruction on the *track* of the road, against which the locomotive or train may strike while running its proper course and direction, and it must be perceived by the engineer. An animal, though near the road, and on the company's right of way, is not an obstruction on the track of the road, within the meaning of the statute.—*L. & N. R. R. Co. v. Reidmond*, 11 Tenn. 205. When it is sought to hold the company liable for damages resulting from a failure to comply with the requirements of the statute, the inquiry should be directed to the ascertainment of the fact, on the existence of which the statutory duty arises. To establish it, positive proof is not essential. Like any other fact to be judicially ascertained, circumstances, from which the inference may be reasonably and satisfactorily drawn—convincing to the mind—will be sufficient. When the fact exists, it is the duty of the engineer to use all means, known to skillful engineers, to stop the train: and when it is established on the trial, the burden is on the company to show a compliance with the requirements of the statute. The law, however, does not exact an attempt of the impossible. If an animal suddenly springs on the track, in front of, and so

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near to the engine, that no human appliances could avail to avoid the injury, the engineer does not violate his statutory duty in not making the attempt to stop the train.—See this case, at the last term, 74 Ala. 150, and 75 Ala. 466.

This construction of the statute does not relieve the company of all liability, when the obstruction is not on the track of the road. When an animal is off the track, and is discovered in close proximity, under circumstances indicating danger, the duty and liability of the company are governed by the rules of the common law.—*S. & N. Ala. R. R. Co. v. Jones*, 56 Ala. 506. The employees are required to use the care and diligence which a careful and prudent person, handling agencies of similar hazard and power, would employ in the management of his own business. All reasonable care and diligence should be observed, to prevent danger or injury. If a horse is seen on the side of the road, or running along its line, while the train is in motion, proper means should be used to frighten him away; and if the road is fenced on both sides, the horse running between the fence and the road, and the first opening is on the opposite side, the expectation that he would attempt to cross at the first opening is natural; and under such circumstances, it is the duty of the engineer to adopt means to check the speed of the train, that the horse may safely pass, unless checking involves more peril than continued running.

We have stated the rule governing the liability of the company, on the hypothesis that the animal is seen. Actual discovery is not essential. The obligatory care and diligence consist, both in a proper watchfulness, and in the use of the appropriate and necessary means to prevent an accident, when the danger is discovered. When the animal is not seen because of the inattention or negligence of the engineer, and injury results by reason thereof, the company is liable, as if the animal had been observed. A proper lookout at all times, along the track, and near the road, is a duty enjoined by law. An engineer has other equally important duties in operating a train, which demand portions of his time and attention. It is not meant, "that the engineer shall keep his eye steadily on the track before him, to the neglect of his other equally imperative duties. . . . He meets this requirement, when he bestows on the service that steady, regular care and watchfulness, which his other duties allow a very careful and prudent person to give to it."—See this case, *supra*.

Negligence *vel non*, in such case, depends upon the attendant circumstances. The inquiry, to which the investigation should be directed, is, whether the engineer, by keeping a proper lookout, consistent with the discharge of his other duties, could have discovered the animal in time to prevent the in-

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jury by the employment of due precautions. In this case, if, on the foregoing rules, the engineer could have discovered the horse in time to have checked the speed of the train, so as to have allowed him to escape, the company is guilty of negligence. On the other hand, if the engineer was in the discharge of his duties, and was using that degree of diligence which very prudent persons observe in the conduct of their own business, and did not discover the horse, until it sprang on the track in front of, and in such proximity to the engine, that no human agencies could have avoided the injury, the company is not liable. The question is, not whether the engineer could have possibly discovered the horse, but whether there was a reasonable capability of seeing him under all the circumstances.—74 Ala. 150.

There is no error in giving the charges asked by the plaintiff, as we understand them. If it was supposed they were calculated to mislead, explanatory or qualifying charges should have been requested. The second instruction asked by defendant should have been given. The doctrine of error without injury can not be applied to the refusal, because the court had previously given another charge asserting substantially the same legal proposition. The parties have a right to frame their charges, and, if correct, to have them given in the language used.—*Polly v. McCall*, 37 Ala. 20.

The presumption is, that every witness intends to tell the truth. It is unquestionably the duty of the jury, in scrutinizing and examining the evidence, to weigh fairly and impartially the testimony of each witness—judging his credibility by his conduct while testifying, the probability of his statements, his intelligence, and the other legitimate tests by which truth is ascertained; and a juror disregards the solemn obligation of his oath, when he rejects without a legal reason—capriciously or whimsically—the testimony of any witness. It is also conceded, that if the jury was convinced of the truth of the evidence of the engineer, it was their plain duty, on the principles of this opinion, to render a verdict for the defendant. Had the sixth charge merely asserted these legal propositions, it would have been unobjectionable. The error consists in the assumption of the fact, “that there has been no attempt to impeach the veracity of the engineer.” One mode of impeaching a witness is to disprove, by other witnesses, the facts stated by him.—1 Green. on Ev. § 461. The charge, as framed, was properly refused, if there is any evidence from which a contradiction can be inferred.

While a juror should discard all prejudice or partiality, against or in favor of either party; and while it is oftentimes highly proper, and even necessary, that the presiding judge, in

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order to secure a fair and impartial trial, should caution the jury against any undue influence, and impress the necessity of a fearless and conscientious discharge of their duties, without regard to consequences, and the disgrace which a disregard would bring upon the administration of the law ; such instructions should be couched in language not disrespectful to the jury, and not assuming, in advance, that any of the jurors intended to disregard their high and imperative obligations. Charges, to which these faults attach, may be properly refused.

A charge which is ambiguous, or requires qualification or explanation, or tends to confuse the jury, ought not to be given. The seventh charge is obnoxious to this objection. It is difficult to understand what legal proposition it was intended to assert.

We have not deemed it necessary, as there must be a reversal, to consider the remarks of counsel in the concluding argument. We refrain from doing so, in the expectation that counsel will not transgress the domain of legitimate argument.

Reversed and remanded.

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*Action for Money Had and Received, by Mortgagee of Crops
against Purchaser.*

1. *Proof of mortgage, where mortgagor and attesting witnesses sign by mark only.*—When a mortgage of personalty is signed by the mortgagor by mark only, and each of the subscribing witnesses signs by mark only, and neither of them is able to identify the paper or any of the marks, the execution of the instrument may be proved by the testimony of the mortgagee himself, or of any other person who saw the maker execute it; and it may be admitted as evidence on such proof, without more.

APPEAL from the Circuit Court of Bullock.

Tried before the Hon. H. D. CLAYTON.

This action was brought by J. O. Hough against K. T. Jones, was commenced in a justice's court, and removed by appeal into the Circuit Court, where the plaintiff had a verdict and judgment. The complaint claimed one hundred dollars, as money had and received by the defendant, to and for the use of the plaintiff. From the evidence adduced on the trial, as stated in the bill of exceptions, it appears that the plaintiff had a mortgage on the crops to be raised by one Dave Calhoun during the year 1881; and he claimed that the defendant had

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received and sold the crops, having notice and knowledge of his mortgage. The plaintiff's mortgage was dated February 21st, 1881; was signed by said Dave Calhoun, by mark only, and attested by two witnesses, each signing by mark only; and the property conveyed by it was thus described: "All the crop that may be made, or caused to be made by me, during the present year; all of which is mine, and unincumbered, except two bales of cotton rent." The plaintiff, testifying as a witness for himself, was allowed by the court to prove the execution of this instrument, though the two attesting witnesses were present in court; and to this ruling, as also to the admission of the mortgage itself as evidence on this proof of its execution, exceptions were duly reserved by the defendant. These rulings, with other matters, are now assigned as error.

J. T. NORMAN, for the appellant, cited 1 Greenl. Ev. § 569; *Bennett v. Robinson*, 3 Stew. & P. 227; *Falls & Caldwell v. Gaither*, 9 Porter, 605; *Ellerson v. State*, 69 Ala. 2; *Jenks v. Ferrell*, 73 Ala. 238; *Russell v. Walker*, 73 Ala. 315.

STONE, C. J.—The first assignment of error raises the question of the legality and sufficiency of the proof of the mortgage, under which Hough asserted claim to the money sued for. That instrument purports to be signed with the maker's mark, and to be witnessed by two witnesses, each of whom signed only with a mark. The plaintiff alone was examined to prove the execution, and he testified that Dave Calhoun, the maker, executed it. On this proof it was allowed to go to the jury, and Jones, the defendant, excepted. Before the testimony in proof of execution was offered, defendant admitted that the subscribing witnesses, who were in court, if placed on the stand, "would state they were illiterate, and could neither read nor write; that plaintiff could not prove by said witnesses the execution of said mortgage; that neither of said witnesses could identify said mortgage as the writing each was requested to make [his or] her mark upon as an attesting witness, by said plaintiff; nor could either of said witnesses say that the mark appearing near [his or] her name as written, was [his or] her mark, nor could either identify the mark appearing near the name, Dave Calhoun." In such case as this, how is the execution of the paper to be proved?

In *Gilliam v. Perkinson*, 4 Rand. 325, is this language: "In the case before us, the witness has made his mark. Now I ask, how could this be proved?" There is a distinct, individual character in the handwriting of every man who can write; and with those who have written much, that character is so fixed and striking, that persons acquainted with it will

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feel no more difficulty in recognizing it, than in knowing the face of the writer. Where the name of a witness is written by himself, therefore, it may generally be proved with something like certainty. But here, there was no writing. The name of the witness was written by another; and he makes a cross-mark—perhaps, the first and the last he ever made in his life. To attempt to prove such a signature as this, would be a mockery of justice. And the court, seeing this, did right in allowing the handwriting of the party to be proved.” In *Watts v. Kilburn*, 7 Ga. 356, Justice Lumpkin, with his accustomed strong common sense, said: “The name of the witness is written by another, and he makes a cross-mark. In this there is nothing distinctive to fix its identity. Who can know it? Upon this point, then, we think the court was right in treating such a signature as a nullity, and allowing the handwriting of the party to be proved.” In *Jackson v. Van Dusen*, 5 Johns. 144, the attesting witnesses were dead. One of them, who could not write, had adopted as his mark an imperfect representation of the capital letters, *S. W.*, the initials of his name. The court said: “Some slight evidence was given to prove the letters *S. W.* to have been made by Samuel Wheeler, the third witness; but to the latter I do not now, nor did I at the time, attach any importance.”—1 Whar. Ev. § 727. See *George v. Surry*, 1 Moody & Malk. 516; *Baker v. Dening*, 8 Adol. & El. 94; *Allaire v. Allaire*, 8 Vroom, N. J. Law, 312. The Circuit Court did not err in receiving proof of the execution of the mortgage, nor in allowing it to be read to the jury.

It would seem that one of the controverted questions of fact in the court below, must have been, whether the agreement for the lease of the “Long field” was entered into before February 21st, 1881—the date of Dave Calhoun’s mortgage to Hough; and that a second mooted question was, whether Dave Calhoun was, in fact, a lessee with Fields. In this controverted state of the proof, we find no error in either of the charges excepted to.

Affirmed.

Webb v. Crawford.

Bill in Equity to enforce Trust in Lands, in nature of Bill for Specific Performance by Purchaser.

1. *Naked trust ; estate of joint grantees.*—Where the owner of lands conveys them by deed, in trust for himself and another person, imposing no duties whatever on the trustee, a dry, naked trust is created, and the legal title is vested in the beneficiaries (Code, § 2185) ; and in the absence of words creating a different estate, they hold as tenants in common.

2. *Variance between allegations and proof.*—Where the bill is filed to compel a conveyance of the legal title, in the nature of a bill for specific performance, and avers that a deed was executed to the complainants' ancestor by the trustee to whom the property had been conveyed creating a naked trust, and that this deed was executed at the instance of the two beneficiaries of the estate, on a sale made by them jointly, in payment of a debt due by them jointly ; while the proof shows that the sale was made by one of them only, and the conveyance executed at his instance, without the knowledge, assent, or subsequent approval of the other,—there is a fatal variance between the allegations and the proof.

APPEAL from the Chancery Court of Dallas.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 28th August, 1882, by John C. Webb, as the administrator of the estate of Mrs. Amanda A. Sterling, deceased, together with her four sons, against Robert C. Crawford and D. S. Troy ; and sought a decree divesting the legal title to a certain tract of land out of the defendants, and vesting the same in the complainants. The complainants claimed the lands as devisees under the last will and testament of Edwin A. Glover, deceased, and the defendants asserted title as purchasers at a sale made by the assignee in bankruptcy of Robert W. Smith and Charles Walshe, and of their late mercantile partnership, Walshe, Smith & Co. The material facts, as the case is here presented, are stated in the opinion of the court. The chancellor dismissed the bill, on final hearing on pleadings and proof, and his decree is now assigned as error.

BROOKS & ROY, for the appellant.—At law, when the plaintiff sues for the entire premises, or the entire interest therein, he may recover less than the whole.—*Tarver v. Smith*, 38 Ala. 135. In equity, also, the plaintiff may recover whatever interest the evidence shows he is entitled to, though it be not the

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whole.—*Munford v. Pearce*, 70 Ala. 452. Here, the complainants are entitled to recover one half of the land at least, being the undivided interest of Walshe. If there was any fatal variance, an amendment should have been allowed, or the bill should have been dismissed without prejudice.—*Munchus v. Harris*, 69 Ala. 506.

TROY & TOMPKINS, *contra*, cited *Aday v. Echols*, 18 Ala. 353; *Ellis v. Borden*, 1 Ala. 548; *Ellerbee v. Ellerbee*, 42 Ala. 643; *Goodwin v. Lyon*, 4 Porter, 297.

STONE, C. J.—The legal title to the land which is the subject of this suit, was in Robert W. Smith. No attempt is made to trace it further back, nor to show that he held otherwise than in his individual right. He and his wife conveyed the lands by deed to C. W. Butt, in express trust to hold for Charles Walshe and for him, Smith. The deed charges the trustee with no duties. The effect of this, it is conceded, is to vest the legal title in Walshe & Smith, disrobed of the attempt to create a trust.—Code of 1876, § 2185; *Mason v. Pate*, 34 Ala. 379. Neither the title papers nor the pleadings show that Walshe and Smith held in any special capacity. The result is, that they must be treated as tenants in common. Subsequently, Butt conveyed the lands to one Glover, in payment of a debt due to him from Walshe, Smith & Co., and Glover devised them to Mrs. Sterling and her four sons. The present bill is filed by the sons and the administrator of their mother, and seeks to establish an equity in the lands, against purchasers at a bankrupt sale, made by the assignee of Walshe and Smith.

The averments of the bill, showing the conveyance from Butt to Glover—an indispensable link in complainants' equitable claim—are in the following language: "That on the day and year last aforesaid [August 31, 1873], the said Charles Walshe and Robert W. Smith made and entered into a contract with the said Edwin A. Glover, whereby they agreed to sell, and said Glover agreed to purchase said lands, in full payment and satisfaction of twenty thousand dollars of the aforesaid indebtedness, and to make, or cause to be made and executed to said Glover, good and sufficient titles in fee simple to said lands; and that said Charles Walshe and Robert W. Smith assured said Glover that the legal title to said lands was in the said Cary W. Butt, in trust for them, and that a deed of conveyance executed to said Glover for said lands would be sufficient to invest said Glover with a good and sufficient title to said lands, as by said contract is provided." The bill then avers that the title was so made by Glover to Butt. This averment

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is substantially put in issue by unsworn answer of the defendants.

The only testimony offered, tending to prove the truth of this averment, is that of Charles Walshe. He testified as follows: "Said deed was executed by Mr. Butt at my instance and request, as a member of the firm of Walshe, Smith & Co., and at that time I was managing the business of my firm. My partner, Mr. Robert W. Smith, was an invalid for several months about that time, and did not attend to any business. I do not recollect of any positive expression of approval of the making of that deed to him." There is no proof that Robert W. Smith was ever informed of the conveyance to Glover. True, in his cross-examination, Walshe testified, that "the firm of Walshe, Smith & Co. was at that time indebted to Mr. Glover, and the said deed to Cary W. Butt in trust conveyed to him property belonging to Walshe, Smith & Co., for the purpose of paying a debt due to Mr. Glover from that firm." There is, however, no averment in the bill to let in this proof; and, if the facts be averred and shown as Mr. Walshe testifies to them, it would still present a question, not necessary to be here decided, whether Walshe alone did, or could, create an equity in Mr. Smith's part of the land.—*Espy v. Comer*, 76 Ala.

It is contended for appellant, that the foregoing discrepancy between the averments and the proof presents only the question, often met, of a suit for the whole, with proof of right, the same in character, to only a part of the thing sued for. That is not the question this record raises. The averment of the bill, not sustained by the proof, is a necessary link in the chain of averred facts, on which complainants found their equitable right to relief. Between such averred facts and the proof, there must be harmony in all that is of substance. To authorize relief, sufficient facts must be averred, sufficient proof made, and the averments and proof must agree. Less than this last requisite is a fatal variance.—*Floyd v. Ritter*, 56 Ala. 356; *Meadors v. Askew*, *Ib.* 584; *McKinley v. Irvine*, 13 Ala. 681; 1 Brick. Dig. 743, §§ 1538, '39, '40; *Winter v. Merrick*, 69 Ala. 86; *Munchus v. Harris*, *Ib.* 506; *Conner v. Smith*, 74 Ala. 115; *Young v. Hawkins*, *Ib.* 370; *Jenkins v. Webb*, 72 Ala. 303; *Hooper v. Strahan*, 71 Ala. 75; *Lewis v. Montgomery Mut. B. & L. Asso.*, 70 Ala. 276; *Helmetag v. Frank*, 61 Ala. 67; *Schaffer v. Lavaretta*, 57 Ala. 14; *Rea v. Longstreet*, 54 Ala. 291.

There are other grave questions presented by this record, upon which we intimate no opinion whatever.—*Banks v. Ogden*, 2 Wall. 57; *Baily v. Glover*, 21 Wall. 342; *Jenkins v. International Bank*, 106 U. S. 571; Bump on Bankruptcy, 10th ed. 558 *et seq.* Lest, however, we may do the complainants an

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unwitting injury, we will so for modify the decree of the chancellor, as to make it a dismissal without prejudice.

So modified, the decree of the chancellor is affirmed.

CLOPTON, J., not sitting.

East Tenn., Va. & Ga. Railroad Co. v. Carloss.

Action against Railroad Company, for Injuries to Stock.

1. *Complaint; averment of time and place.*—In an action against a railroad company, to recover damages for injuries to stock, whether commenced before a justice of the peace or in the Circuit Court, the complaint must specify “the time when, and the place where the killing or injury occurred” (Code, § 1711); and it is not sufficient, on demurrer, to state only the month and the county.

2. *Variance, as to time.*—When the injury is alleged to have occurred on the 21st day of the month, and the evidence shows that it occurred on the first day, the variance is fatal, and the evidence should be excluded.

3. *Averment of negligence.*—If the complaint alleges that three of the plaintiff's cattle, particularly describing them, “were killed, and the other was injured or damaged to the value of ten dollars, by the negligence of the defendant in running a train of cars and locomotives on said railroad, and thus became wholly lost to plaintiff;” this is a sufficient averment that the injury was caused by the negligence of the defendant.

4. *What witness may state.*—A witness who testifies that, while looking for his own cattle, he saw plaintiff's stock near the railroad as he passed, and, on returning an hour and a half afterwards, saw them again just as a train moved off, after stopping, at the place where the cattle were injured, may further state that, if any other train had passed during the intervening time, he could have heard it, and that no other train did pass.

5. *Argument of counsel.*—Under the rule established by the former decisions of this court, counsel transgress the bonds of legitimate argument, in addressing remarks to the jury about matters which are not in evidence before them; and the presiding judge has ample power to check argument of this character.

APPEAL from the Circuit Court of Colbert.

Tried before the Hon. H. C. SPEAKE.

This action was brought by William J. Carloss, against the appellant, a corporation engaged in operating a railroad in this State; and was commenced on the 29th August, 1882. The complaint contained two counts. The first count claimed \$60 “as damages, for that whereas, in the month of January, 1882, the plaintiff had and owned one large fine milch-cow, about four years old, of the value of \$40, and two fine work-oxen about three years old, worth \$40, and one large two-year-old

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steer, worth \$10; and on or about the 21st of said month, in the county of Colbert, Alabama, the said cow, the two-year-old steer, and one of the three-year-old oxen were killed, and the other one injured or damaged to the value of ten dollars, by the negligence of the defendant in running a train of cars and locomotives on the railroad of said defendant situated in said county, and thus became wholly lost to plaintiff; to his damage \$60." The second count also claimed \$60 as damages, "for that whereas, during the month of January, 1882, and previous to that time, the defendant was using and operating a line of railroad, extending from the city of Memphis, in Tennessee, to the town of Stevenson, in Alabama, which said line of railroad extends through said county of Colbert; and plaintiff avers that, in the month of January, 1884 (?) he had and owned" the cow and oxen described as above; "and that said defendant, in said month of January, 1882, while running a train of cars and locomotives on said railroad in said county of Colbert, so carelessly and negligently as to run said locomotive and train of cars upon and against the said cow and oxen, that the same were killed or injured; to the damage of plaintiff \$60."

The defendant demurred to each count of complaint, assigning the following grounds of demurrer to the first count: 1st, "because it fails to aver that said alleged injury and trespass was occasioned by the killing or striking of said animals, or any of them, by the locomotive or cars of this defendant;" 2d, "because it contains no averment that there was any collision between said animals and the locomotives or cars of this defendant;" 3d, "because it fails to aver any negligence on the part of the defendant, except as to said alleged injury to one of the oxen;" 4th, "because said count is vague and indefinite, in that it fails to aver the place in said county where said alleged injury occurred, and, by such failure, defendant is not apprised of a fact material to be known for the proper defense of this suit;" 5th, "because said count is vague and indefinite, in that it does not show that the alleged negligence of defendant, in running a train of cars on its railroad, had any connection with the loss and damage to plaintiff's said property as complained of in said count;" 6th, "because said count is argumentative, and is not an intelligible statement of facts, as required by law." The same grounds of demurrer were assigned to the second count. The court overruled the demurrer, and the cause was tried on issue joined on the plea of not guilty.

On the trial, as appears from the bill of exceptions, the plaintiff introduced one Howell as a witness, who testified that, "about one or two o'clock in the afternoon of about January 1st, 1882," he walked down the railroad track in search of some stock, and, as he passed, saw plaintiff's cattle, which he de-

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scribed, in plaintiff's field about one hundred yards from the railroad; that he found his stock in a field about one mile from the railroad, and then returned, having been absent about an hour and a half; that he was walking back on the railroad track, near the bridge over Cane Creek, when he was overtaken and passed by a train of cars; that he heard the train, after passing him, "whistle, and stop, and then back;" that, after crossing the bridge, he saw the train standing still, "and saw two persons walk around the pilot of the engine, where the cattle were killed, about three or four hundred yards distant from him;" that the train moved off before he reached it, and that, on arriving at the place, he found the cattle killed and injured, as he described. During the examination of this witness, plaintiff asked him this question: "If, during your absence from the railroad on the occasion in question, another train had passed, could you have heard it?" to which question he answered, "that he could have heard any other train, and that there was no other train." The defendant objected to this question and answer each, as calling for and expressing the mere opinion of the witness; and an exception was duly reserved to the overruling of these objections. This being the only evidence as to the time when the injury occurred, the defendant moved the court, after the plaintiff had closed, to exclude it from the jury, on the ground of a variance between it and the averments of the complaint; which motion the court sustained "as to the first count, but overruled as to the second count;" and to the overruling of said motion the defendant duly excepted.

"The plaintiff offered in evidence a part of the record of a suit which had been begun before a justice of the peace, against Jas. B. White, the stock agent of the Memphis & Charleston Railroad Company, prior to the institution of this suit, for \$60; which suit had been quashed;" but the court excluded this evidence, on the objection and motion of the defendant. The plaintiff himself testified as to the value of the cattle which were killed and injured, and as to the presentation of his claim for damages to an agent of the defendant. The defendant seems to have introduced no evidence, and the bill of exceptions states that the above "was all the evidence."

"In the course of his concluding argument to the jury, the plaintiff's counsel stated, that the plaintiff had brought his suit in a cheap court, before a justice of the peace, but it was decided to be beyond the jurisdiction of the court, and so he was forced to come into this court, and await its expense and delay. The defendant immediately excepted to said statement so made, because it was the statement of facts which were not in evidence before the jury. The plaintiff's counsel did not in any

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way retract his said remarks, but proceeded with his argument; and afterwards, in his further argument, stated to the jury, that the defendant's counsel 'stands up here as the representative of this bloated corporation;' and again, "This defendant is a large and powerful organization, perhaps counting its employees by the thousand, and it is here litigating with a poor man who has only a few head of cattle." As to each of these statements, the bill of exceptions states, as before, "Defendant immediately excepted to said statement so made, because it was the statement of facts which were not in evidence before the jury; but the counsel proceeded with his argument, and did not in any way retract his remarks."

The several rulings of the court on the pleadings and evidence, as above stated, are now assigned as error; and assignments of error are also based on the remarks of counsel above copied, and the failure of the court to interfere, and to instruct the jury that they could not consider said remarks for any purpose.

HUMES, GORDON & SHEFFEY, for appellant.

J. T. KIRK, *contra*.

SOMERVILLE, J.—Where a suit is instituted for damages to live stock, or cattle of any kind, caused by locomotives or railroad cars in this State, a justice's court has jurisdiction of such cause, when the value of the stock or cattle so killed, or the damage done, is one hundred dollars, or less.—Code, 1876, § 1711. When such value or damage exceeds one hundred dollars, the suit must be brought in the Circuit Court.—Code, § 1714. All such claims are expressly barred by statute, unless the complaint is made, by suit or presentation, within six months from the date of the killing or injury.—*East Tenn. Va. & Ga. R. R. Co. v. Bayliss*, 74 Ala. 150.

The statute provides that the complaint, when filed with the justice of the peace, must be in writing, and set out the number and character of the stock or cattle so killed or injured, and must also specify "the *time* when, and the *place* where the killing or injury occurred," with the name of the owner, and of the defendant owning or controlling the road, whether a corporation or a natural person.—Code, 1876, § 1711. It is our opinion that like averments should be made when suit is commenced by complaint before the Circuit Court. This is a fair inference of the legislative intention, as shown by the act approved February 3d, 1877, which is embraced in sections 1710 to 1716 of the Code. The purpose of the requirement is to inform the railroad officials, with reasonable certainty, as to the

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circumstances attending the alleged injury, so that they may act advisedly in the investigation of the case, either with the view of voluntary adjustment, or of defense at law. The *time*, we think, should be stated to be a specified day of a given month and year. The *place* should be averred to be at a certain locality along the line of the road, describing its distance and direction from a named depot, or other known point. Any thing more general than this would not be sufficiently certain as a statement of "the *time when*, and the *place where* the killing or injury occurred," within the meaning of the statute, or for the fulfilment of its manifest purposes. A mention of the *county* merely is lacking in certainty as to place.

The second count of the complaint in this cause failed to state the particular day in the month of January, 1882, when the alleged injury was done, and was for this reason defective. The demurrer to it based on this ground should have been sustained. The first count alleged the injury to have occurred on the 21st day of January, 1882. The evidence showed that it occurred about the first day of the same month, or three weeks prior to the time stated. This was a variance, and the court erred in refusing to exclude this evidence.

The defendant was liable for any damage wrongfully caused by its locomotives or railroad cars to the live stock or cattle of the plaintiff described in the complaint.—Code, § 1710; *Zeigler v. S. & N. Ala. R. R. Co.*, 58 Ala. 594. The first count of the complaint sufficiently averred that the injury complained of was caused by the negligence of the defendant. The first two grounds of demurrer to this count were properly overruled, under the authority of *S. & N. Ala. R. R. Co. v. Thompson*, 62 Ala. 494.

The question propounded to the witness Howell, and his answer to it, can not be regarded as calling for, or expressing a mere opinion. He was asked, in effect, whether he was near enough to the line of the railroad to have heard any other train than the one in question, if one had passed during the interval of an hour and a half when he was in the neighborhood of the place where the cattle were injured. This called for a fact, not an opinion.—*Cox v. The State*, 76 Ala. 66; *Tesney v. The State*, at the present term, *ante*, p. 33.

The language of counsel used in the argument of the cause was clearly in violation of the rule established by our decisions, governing the latitude of forensic discussions.—*East Tenn., Va. & Ga. R. R. Co. v. Bayliss*, 75 Ala. 466; *Motes v. Bates*, 74 Ala. 374; *Wolffe v. Minnis*, 74 Ala. 386; *Cross v. The State*, 68 Ala. 476. As the case is sent back for a new trial on another point, we need not consider whether the exception was properly taken so as to raise this question. Circuit judges

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have ample power to check arguments of this character, by setting aside verdicts obtained through their influence, either on motion of the adverse party, or *ex mero motu*. If it were exercised more freely in such cases, this court would probably be troubled with reviewing fewer transgressions of the rule to which we have above referred.

The judgment is reversed, and the cause remanded.

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Action against Railroad Companies, for Personal Injuries.

1. *Struck jury*.—Under the statute giving “either party,” in a civil action, the right to demand a struck jury (Code, § 3018), all the persons litigant on one side, whether as plaintiffs or as defendants, are regarded as one party; and where there are several defendants, having different defenses, the right of the plaintiff to a struck jury can not be defeated, because they can not agree among themselves as to the names to be struck off, but the court may, in such case, allow each defendant to strike off a name in rotation.

2. *Injuries caused by traps and pitfalls; liability of owner for damages*. All persons, whether natural or artificial, who own lands on which the public is invited, expressly or impliedly, to enter, are bound to keep such lands free from traps and pitfalls, and are liable in damages at the suit of any person injured by the neglect of this duty; but the principle does not extend to places which are strictly private, or to which the public is neither invited nor expected to go.

3. *Same, as applied to railroad companies*.—All the property of a railroad company, including its depots and adjacent yards and grounds, is its private property, on which no one is invited, or can claim a right to enter, except those persons who have business with the railroad; which class embraces, not only passengers, but protectors and friends attendant on their departure, or awaiting their arrival.

4. *Same*.—To the class of persons thus having business, the railroad company is under obligation to keep in safe condition all parts of its platforms, with the approaches thereto, to which the public do, or would naturally resort, and all portions of the station-grounds reasonably near to the platform, where passengers would be likely to go, and to provide safe waiting-rooms, and to keep the depot and platform well lighted at night; but, to the public at large, the company owes “nothing beyond the observance of the duties of good neighborhood,” which includes “the universal duty of doing no willful or wanton injury, and of not erecting or continuing, on or near its platform or approaches, to which the public may be expected to go, any nuisance, trap, or pitfall, from which personal injury is likely to ensue.”

5. *Contributory negligence as defense*.—To an action against a railroad company, to recover damages on account of personal injuries sustained from a neglect of this duty [to keep its depot grounds and approaches in safe condition], contributory negligence on the part of the plaintiff himself is a complete defense.

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6. *Liability of owners and lessees of railroad.*—The building in the city of Montgomery known as the "Union Depot," with the yard or grounds annexed, is the property of the two railroad companies known as the South and North Alabama, and the Louisville and Nashville; but the Montgomery and Eufaula railroad company, having acquired by lease, at a stipulated rent, the right to use the property in common with them, for the arrival and departure of its trains, with the use of its waiting rooms, ticket-office, baggage-room, &c., is liable to passengers and the public generally, in relation to the property, as if it were the owner in fee.

7. *Application of these principles to case at bar.*—The plaintiff in this case came to Montgomery on the Montgomery and Eufaula railroad, and, on alighting from the train at the Union Depot, desiring to find a privy, made inquiry of a stranger, who pointed in the direction of a privy erected on the bank of the river, at the further end of the platform, about fifty yards from the depot; and in trying to find it, he wandered beyond it in the dark, fell down the steep bluff, and sustained serious injuries. The railroad platform was well lighted, and extended from the depot to the river; but there was no light at the privy, and a house intervened between it and the lights on the platform. *Held*, on these facts, that the plaintiff had no cause of action against the railroad companies who owned the property, as to them being a mere stranger; and that he could not recover against the Montgomery and Eufaula corporation, lessees of the property, because, being acquainted with the locality, he was guilty of contributory negligence in attempting to find the privy without further inquiry.

8. *Duty of railroads to provide privy accommodations.*—By statute enacted since the occurrence of the injury in this case, it is made the duty of railroad companies to provide privy accommodations at depots and stations, when required to do so by the Railroad Commission (Sess. Acts 1882-3, p. 154); and this may be regarded as "a legislative intimation that, theretofore, the duty was at least doubtful."

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JOHN P. HUBBARD.

This action was brought by T. B. Thompson, against the Montgomery & Eufaula Railway Company, the South & North Alabama Railroad Company, and the Louisville & Nashville Railroad Company, to recover damages for personal injuries sustained by plaintiff on the night of February 1st, 1883, by falling down the steep bluff of the river near the Union depot, at the foot of Commerce street in the city of Montgomery; and was commenced on the 21st May, 1883. The original complaint contained but a single count, which alleged that on said February 1st, 1883, the defendants "were using and occupying a certain piece of property in the city of Montgomery, at the foot of Commerce street, known as the 'Union Depot,' being the place at which passengers travelling to and from said city of Montgomery, upon the trains running on the roads operated by said railroad companies respectively, got on and off the cars; and that it was the duty of said defendants to keep the platforms of said depot, and the approaches thereto (to which passengers, going off or getting from the trains of said roads, do or would naturally resort), and all portions of the

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grounds reasonably near to said depot, where passengers coming in, or those who have purchased tickets for the purpose of going on their cars, would naturally or ordinarily be likely to go, in a safe condition for such passengers and persons to pass over and upon; but said defendants, in violation of their said duty, wrongfully, negligently and carelessly suffered a high, steep, and precipitous bank, beginning at a portion of said station grounds, reasonably near the platforms of said depot, and where passengers going on and getting off their trains would naturally or ordinarily be likely to go, to remain open, and without any railings, or other security to prevent passengers from walking over, or falling off the same;" and that plaintiff, "while lawfully at said depot on said 1st February, 1883, and upon said grounds, as a passenger of said Montgomery & Eufaula Railway Company, in the night-time, without negligence on his part, fell over said embankment, to the edge of the river below, and by such fall was grievously bruised and injured," &c.

A demurrer to the complaint was filed by the Montgomery & Eufaula Railway Company, assigning the following as grounds of demurrer: 1st, because "it owes no duty to the public, as alleged in said complaint, to keep the platforms of the depot, and the approaches thereto, to which the public resort, in a safe condition for persons to pass over;" 2d, "because it is not alleged that said bank was a place where this defendant's passengers would be likely to go, in going to or getting off its cars, in purchasing tickets to travel on its road, in looking after their baggage, or pursuing other lawful purpose for which a passenger might use its premises;" 3d, "because it does not allege that this defendant had any control over said bank;" 4th, "because it does not allege that plaintiff was injured in getting on or off this defendant's cars, or in purchasing a ticket to travel on its road, or in looking after his baggage, or in pursuing any other lawful purpose for which a passenger might use its premises;" 5th, "because it fails to show that plaintiff received said alleged injuries through any misfeasance or non-feasance of duty due him as a passenger on its road."

A demurrer was also filed by the two other defendants jointly, assigning the following as grounds of demurrer: 1st, because of misjoinder of defendants, no privity being shown between them and their co-defendants; 2d, because the complaint shows that the plaintiff was not a passenger on the train of either of these defendants; 3d, because the complaint does not show that the plaintiff, at the time of the accident, had been a passenger on either of their roads, or was about to become a passenger, or was about the depot for that purpose; 4th, because the facts stated do not show that either of them

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owed the plaintiff any duty whatever at the time he received the alleged injuries ; 5th, because the facts stated do not show that plaintiff was lawfully at the place where he received the alleged injuries ; 6th, because the complaint shows that the alleged injuries were not received at the depot of these defendants, or at any of the approaches to their depot or platform ; 7th, because there is no duty devolving upon these defendants, or either of them, to maintain or keep in order a platform, or approaches thereto, or any place of resort, for the benefit of the public.

The court sustained the demurrer of the M. & E. Railway Company, on the first ground assigned, but overruled it as to all the others ; and also sustained the demurrer of the other defendants, on the last ground assigned, overruling all the others. The plaintiff then amended his complaint, by adding an additional count, which alleged, in addition to the facts averred in the original complaint, that the defendants, "in violation of their said duty, wrongfully, negligently and carelessly suffered a high, steep and precipitous bank, beginning at a portion of said station grounds reasonably near to the platforms of said depot, and running along said grounds to a point thereon where there was situated a privy, or water-closet, where passengers going on or getting off said trains would ordinarily or naturally be likely to go, and to which such passengers were in the habit of going for the purpose for which such places are intended and used, and to reach which they would ordinarily and likely pass along said embankment, to remain open, and without any railing, or other security to prevent such passengers from walking over, or falling off the same, and also suffered the same to remain without lights, or other means of discovering or marking the same, so that said embankment might be seen by passengers resorting to such water-closet ;" that plaintiff, on said 1st February, 1883, being lawfully at said depot and on said grounds in the night-time, as a passenger on the trains of said M. & E. Railway Company, "and having necessity to resort to said privy, or water-closet, so used by passengers, said embankment being unprotected by any railing, and there being no light or other means of marking the same, at a point near said privy fell over said embankment," &c., and sustained grievous injuries. To this amended complaint the defendants assigned the same causes of demurrer as to the original, but the court overruled each of the demurrers. The defendants then each pleaded, in short by consent, not guilty, and contributory negligence on the part of the plaintiff ; and the cause was tried on issue joined on these pleas. A special plea was also interposed by the Louisville & Nashville, and the South & North Alabama railroad companies, alleging that the privy was situa-

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ted on their private premises, seventy-five yards distant from the depot and approaches thereto, and where neither passengers nor other persons were invited or accustomed to go; and that the plaintiff, while intoxicated, negligently and carelessly wandered from the street and the usual route to and from the depot, and fell over the bluff of the river, which was the boundary of the defendants' private property at that point. To this special plea the court sustained a demurrer.

On the trial, as the bill of exceptions shows, the plaintiff having demanded a struck jury, the Louisville & Nashville Railroad Company and the South & North Alabama Railroad Company "objected to a struck jury, on the ground that there were three several defendants, two of whom were making a different defense from the third;" but the court overruled their objection, and they excepted. The same objection was interposed by the M. & E. Railway Company, and an exception duly reserved to the overruling of the objection. "Thereupon, the court ordered the parties to proceed with the selection of a jury, and the plaintiffs, being ordered to strike one juror from the list, did so; and the defendants being then ordered to strike one from the list, the attorney for the M. & E. Railway Company stated to the court, that he was unable to agree with the attorney representing the other defendants, as to what juror should be stricken from the list; but the court ruled that there was really only one 'party defendant,' and that the three defendants must agree; and they being unable to agree, the court directed the attorney for the M. & E. Railway Company to strike one name from the list, and said attorney did so;" to which ruling and action the other defendants excepted. The plaintiff then struck another name from the list, and the attorney for the L. & N. and the South & North Alabama corporations was then directed to strike one name from the list; and this process was repeated until only twelve names remained on the list—the plaintiff striking one name from the list, and the M. & E. Railway Company and the defendants alternately striking another.

The bill of exceptions purports to set out all the evidence adduced on the trial; but the material facts, as to the ownership, location and use of the defendant's property, and the circumstances attending the accident by which the plaintiff was injured, being fully stated in the opinion of the court, no further statement is necessary. On all the evidence, the defendants requested the court, jointly and severally, to charge the jury, that if they believed the evidence, the plaintiff was not entitled to recover against any one or all of them; and they excepted, jointly and severally, to the refusal of these charges. Sixteen other special charges were requested by the defendants,

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asserting their non-liability, on facts hypothetically stated, applicable to the different phases of the case; and exceptions were duly reserved to the refusal of each of these charges.

The court charged the jury, *ex mero motu*, as follows: "If the Montgomery & Eufaula Railway Company used the Union Depot for the purpose of receiving on board of its trains and discharging therefrom its passengers in the city of Montgomery, and that was the common depot for three or four roads, and was its regular and known place for thus receiving and discharging its passengers; then it was the duty of said railway company to have there provided a privy, or water-closet, for the accommodation of such passengers; and this duty exists, although said railway company might only be the lessee of said depot, and only to the extent of entering its trains on said depot grounds, for the purpose of receiving and discharging passengers on and from its trains; so that the mere fact that said railway company was only such lessee, if such be the fact, would not avoid the duty of providing such privy or water-closet. Hence, upon this point, said M. & E. Railway Company can not escape liability, if the jury find the fact to be that said depot was such point of receiving and putting off its passengers; and if the other defendants used and occupied said depot for the purpose of taking in and putting off their passengers, it was their duty to provide a privy, or water-closet, for the use of their passengers." The M. & E. Railway Company duly excepted to that portion of this charge which asserted its liability on the facts stated, and the other defendants excepted to the last clause, which asserted their liability.

The court charged the jury, also, on the request of the plaintiff, as follows: (1.) "Although the jury may believe, from the evidence, that the plaintiff was intoxicated at the time of the accident; yet, if they believe that his intoxication was not of such character as to render him incapable of taking care of himself, then the fact of such intoxication does not necessarily constitute negligence, but is only evidence to which the jury may look in determining whether he was guilty of negligence which contributed to his injury." (2.) "Although the jury may believe that the accident occurred at a point not on the direct route from the depot to the privy, yet, if they believe it occurred at a point to which one seeking such privy in the night-time, with ordinary care, would be liable to go, and that such point was not properly guarded against, then the fact that it was not on the direct route is no defense to the action." To each of these charges the defendants severally excepted.

All of the defendants appeal, and all assign errors, jointly and severally; the assignments of error embracing the adverse rulings of the court on the pleadings, and in the selection and

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organization of the jury, the charges given, and the refusal of the several charges asked.

THOS. G. JONES, and J. M. FALKNER, for the Louisville & Nashville Railroad Company and the South & North Alabama Railroad Company; and ARRINGTON & GRAHAM, for the Montgomery & Eufaula Railway Company, made the following points: (1.) There is a misjoinder of defendants, on the pleadings and proof. There is no privity between the several defendants - no joint obligation arising out of contract; no joint duty, express or implied, and no joint act or breach of duty. (2.) A railroad company is under no duty or obligation to furnish privies at stations for the use of passengers, unless imposed by statute; and the statute enacted since the occurrence of the injury in this case, giving authority to the Railroad Commission to require the erection of such accommodations, is a legislative expression against the existence of the obligation. A sudden call of nature is a species of sickness, against which a railroad company, or other carrier, is no more bound to make provision for its passengers, than against any other kind of sickness. The regulation of privies and water-closets, especially in large towns and cities, is matter of police and sanitary regulation, and involves considerations of climate, sewerage, local facilities, &c.; and neither the necessities of the travelling public, nor the customs of this country, have hitherto required of common carriers that they shall provide such accommodations at their stations. (3.) The duty and the obligation of the M. & E. Railway Company to the plaintiff, as its passenger, terminated when he was landed safely on its platform at Montgomery, his destination, with convenient exit to the streets of the city.—*Zebe v. Railroad Co.*, 33 Penn. St. 318; *Imhoff v. Railroad Co.*, 20 Wis. 363; *Central R. R. Co. v. Coleman*, 28 Mich. 441; *Frost v. Gr. Tr. R. R. Co.*, 10 Allen, 338; *Forsyth v. B. & A. Railroad Co.*, 103 Mass. 511. As to the other defendants, the plaintiff never occupied towards either of them the relation of a passenger; and they were under no more duty or obligation to him than to any other person, or to the public generally. (4.) The rigid rules for the protection of the passenger, after he has commenced his journey, and put himself in the custody of the carrier, have no application to other persons who, by invitation or permission, may come upon the private grounds of the carrier. A carrier's liability "in respect to the condition of his property, is neither greater nor less than that of any private person to another who, by invitation or inducement, express or implied, has come upon his premises for the purpose of transacting business."—*Welfare v. London Railroad Co.*, L. R. 4 Q. B. 693; *Railroad Co. v. Bingham*, 29 Ohio St. 374; *Ind.*

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Railroad Co. v. Hudelson, 13 Ind. 325; *Crofter v. Met. Railway*, L. R. 1 C. P. 300; *Toomey v. Railway Co.*, 3 C. B. (N. S.) 146; *Railroad Co. v. Godfrey*, 71 Ill. 500; *Gillis v. Penn. Railroad Co.*, 59 Penn. St. 129. An entry may be excusable as a trespass, and yet not a matter of right.—*Knight v. Abert*, 6 Penn. St. 472. A person who enters by sufferance, or under an implied license, can not recover for injuries caused by obstructions or pitfalls, but takes the risk.—29 Ohio St. 364; 10 Allen, 372; 41 N. Y. 525; 66 N. Y. 249; 59 Penn. St. 141; 10 Mete. 371; 126 Mass. 377; 44 Geo. 251. (5.) The evidence shows that the plaintiff himself was guilty of negligence, and this bars any recovery.—*Railroad Co. v. Copeland*, 61 Ala. 376; *Railroad Co. v. Letcher*, 69 Ala. 106. (6.) The rulings of the court in the organization of the jury were erroneous. The defendants had different defenses, and could not make common cause.—59 Geo. 83; 37 Mich. 495; 2 La. Ann. 892.

TROY & TOMPKINS, *contra*.—(1.) There exists a common-law duty, on the part of a railroad company, to provide safe and reasonable accommodations at their stations, for all persons who may go there on legitimate business; and an action lies for injuries sustained by a breach of this duty. The duty extends to the stations, platforms, approaches thereto, and all other parts of their grounds to which persons are invited, expressly or by implication, to come for any lawful purpose. *McDonald v. C. & N. W. Railroad Co.*, 26 Iowa, 125, and 29 Iowa, 170; *Railroad Co. v. Schwindling*, 8 Amer. & Eng. R. R. Cases, 550, and cases cited in notes. The plaintiff was not a trespasser, but was lawfully on the premises, and is entitled to the protection of this rule.—*Bennett v. L. & N. Railroad Co.*, 1 Amer. & Eng. R. R. Cases, 71, notes; 102 U. S. 577; *Knight v. Portland*, 56 Maine, 234; *McKone v. M. & C. Railroad Co.*, 13 Amer. & Eng. R. R. Cases, 29; *Stewart v. Railroad Co.*, 2 *Ib.* 497; *Logan v. Railroad Co.*, 73 Mo. 392; *Tobin v. Railroad Co.*, 59 Maine, 183; *Wright v. L. & N. W. Railway Co.*, L. R., 10 Q. B. 298; *Corby v. Hill*, 4 Scott, C. B. (N. S.) 562; *Chapman v. Rothwell*, El., Bl. & El. 168. (2.) The plaintiff was not guilty of any contributory negligence. *Shear. & Redf. Negl.* § 32; *Alger v. Lowell*, 3 Allen, 402; *Robinson v. Pioche*, 5 Cal. 460; *Indermaur v. Dames*, L. R., 1 C. P. 288. (3.) The right to a special jury is given by statute, and plaintiff could not be deprived of it by any disagreement between the several defendants.—Code, § 3018; *Bibb v. Reid & Hoyt*, 3 Ala. 88.

STONE, C. J.—The right to have a struck jury, in a case like the present, is secured by the statute to either party who

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demands it.—Code of 1876, § 3018. In the purview of this statute, there are but two parties, the plaintiff and the defendant. The statute has made no express provision for cases where there are more plaintiffs, or more defendants, than one. Each litigating side is regarded as a suit, no matter how many persons may compose it. The right to have such jury being given by statute, the opposing party can not defeat it, either by divided counsels, or by non-action. The court may, if necessary, compel its observance, or punish its non-observance; and in cases where there are more defendants than one, and the grounds of defense are different, if counsel can not agree on the jurors they would strike, we can conceive of no solution of the difficulty more just and simple, than that adopted by the Circuit Court. To hold otherwise, would be to deny to the plaintiff a clear statutory right, upon a mere technicality.

The depot-building and depot-yard, or grounds annexed, known as the "Union Depot" in Montgomery, are the property of the South and North Alabama and the Louisville and Nashville railroad companies. The Montgomery and Eufaula Railway Company has no interest in the property. It has purchased the common use of said depot property, to the extent that its trains come on the depot-yard for the purpose of receiving and discharging its passengers and their baggage, and receiving and delivering the mails; and it has also the common use of the waiting-rooms, and the ticket and baggage-offices, to the extent they are necessary for the successful running of its passenger-trains. For this use it pays a stipulated rent. Thus using the depot, we do not hesitate to declare that the M. & E. Railway Company rests under the same duties to the public, in relation thereto, as if it owned the property in fee.

There is a common duty resting on all persons, artificial as well as natural, who own real estate on which the public is expressly or impliedly invited to enter, that it shall be kept free from traps and pitfalls; and if this duty be neglected, and injury results therefrom to any person, the person suffering by such trap or pitfall may recover damages for the injury. This is a general rule of society, crystalized into law. It partakes of the nature of a public nuisance done or suffered, which inflicts special injury on an individual. To a suit for such injury, it is no defense that the injury was not intended. Human conduct must be tested by its known general, or ordinary consequences.—*Alger v. City of Lowell*, 3 Allen, 402; *McKone v. Mich. Cen. R. R. Co.*, 13 Amer. & Eng. R. R. Cas. 29; *John v. Bacon*, L. R., 5 C. P. 437; *Indermaur v. Dames*, L. R., 2 C. P. 311; *Smith v. London & St. K. Dock Co.*, L. R., 3 C. P. 326; *McDonald v. Chi. & N. W. R. R. Co.*, 26 Iowa, 124; s. c., 29 *Ib.* 170; *Knight v. P. S. & P. R. R. Co.*, 56

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Me. 234; *Bennett v. L. & N. R. R. Co.*, 1 Amer. & Eng. R. R. Cases, 71, and note; *Gillis v. Penn. R. R. Co.*, 59 Penn. St. 129; *Beard v. O. & P. R. R. Co.*, 48 Verm. 101.

The foregoing rule, however, does not apply to places strictly private, or where persons are neither expected, nor expressly or impliedly invited to go.—*Howland v. Vincent*, 10 Metc. 371; *Kohn v. Lovett*, 44 Ga. 251; *Knight v. Abert*, 6 Penn. St. 472; *Ind. Cen. Railway Co. v. Hudelson*, 13 Ind. 325.

All the property of a railroad company, including its depots and adjacent yards and grounds, is its private property, on which no one is invited, or can claim the right to enter, save those who have business with the railroad. Under this classification, however, we must include attending friends and protectors, who accompany friends to the train, to aid them in getting on, in procuring tickets, and in checking baggage, and kindred services. The same license is accorded to protecting friends, when the traveller is to leave the train. To persons filling these classes, the railroad corporation owe special obligations of duty, different from those due to the general public. While the former come by invitation, express or implied, the latter are mere pleasure-seekers, or are prompted by curiosity. For the use and comfort of the former class, railway companies are bound to keep in safe condition all portions of their platforms, and approaches thereto, to which the public do or would naturally resort, and all portions of their station-grounds reasonably near to the platform, where passengers, or those who have purchased tickets with a view to take passage on their cars, would naturally or ordinarily be likely to go. Within these boundaries, a defect of structure which is likely to, and does cause injury, or any other trap or pitfall producing a like result, will fasten a liability on the railroad owing the duty. Of similar obligation to this primary class, is the duty to provide safe waiting-rooms, and to keep the depot and platform well-lighted in the night-time.—1 *Thompson on Negligence* 313, 314, 315; *Stewart v. I. & G. N. R. R. Co.*, 2 Amer. & Eng. R. R. Cas. 497; *St. L., I. M. & S. R. R. Co. v. Cantrell*, 8 *Id.* 198; *Coleman v. Eastern Counties Railway Co.*, 4 Hurls. & Nor. 781; *Gillis v. Penn. R. R. Co.*, 59 Penn. St. 129; *McKone v. Mich. Cen. R. R. Co.*, 51 Mich. 601; *Seymour v. C. B. & Q. Railway Co.*, 3 Biss. 43.

The rule of obligation is essentially different, when the asserted rights of mere idlers, or sight-seers, are presented. To such the corporation owes nothing, beyond the observance of the duties of good neighborhood. Among these may be prominently classed the universal duty of doing no willful or wanton injury, and of erecting or continuing on or near its platform or approaches, to which the public may be expected

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to go, no nuisance, trap or pitfall, from which personal injury is likely to ensue.—1 Thompson Neg. 313, 314; *B. & O. R. R. Co. v. Schwindling*, 8 Amer. & Eng. R. R. Cas. 544, and note; *Frost v. Gr. Tr. R. R. Co.*, 10 Allen, 387; *Morrissey v. Eastern R. R. Co.*, 126 Mass. 377; *Nicholson v. Erie Railway Co.*, 41 N. Y. 525; *Sutton v. N. Y. Cen. & H. R. R. Co.*, 66 N. Y. 243; *Gillis v. Penn. R. R. Co.*, 59 Penn. St. 129; *P. Ft. W. & Chi. Railway Co. v. Bingham*, 29 Ohio St. 364.

There is another important principle, which may exert some influence in this case. If one, who complains of an injury suffered at the hands of another, has, through intention, recklessness, or carelessness—that is, want of ordinary care or attention—contributed proximately to the injury he complains of, this is a full answer to any right he could otherwise maintain on account thereof.—*Memphis & Charleston R. R. Co. v. Copeland* 61 Ala. 376; Sh. & Redf. on Neg. § 323; *Forsyth v. B. & A. R. R. Co.*, 103 Mass. 510; *Seymour v. Chi. O. & Q. Railway Co.*, 3 Biss. 43; *Frost v. Gr. Tr. R. R. Co.*, 10 Allen, 387. In the case of *Forsyth v. B. & A. R. R. Co.*, *supra*, it appeared that the plaintiff, a passenger, alighted from defendant's cars at night, at a station, on one of two platforms extending along each side of the track to a highway (which, as the plaintiff knew, crossed the railroad), and having a step at the end next the highway; and that, instead of walking along the platform, he voluntarily stepped from it, with the intention of going obliquely across the track to the highway, and, in stepping off, he fell into a cattle-guard which had been dug across the track, and was injured; that the night being very dark, he felt with his feet to find the edge of the platform, but did nothing to ascertain what would be found on stepping from the platform. *Held*, that he was not in the exercise of due care, and could not recover.

The proof in this case shows the following facts, upon which there is no controversy: The Union [passenger] Depot is at the foot of Commerce street, and is approached alone from that street. The end of its platform rests on Commerce street about one hundred feet, pointing up the river, and it extends back, down the river, about two hundred feet. On the side of the platform farthest from the depot runs the Alabama river, with a precipitous, bluff bank. The ticket-office, waiting and baggage-rooms are on the side farthest from the river, and the platform is kept well lighted, in the night-time. No complaint is urged that the platform and its approaches were not in good order and well lighted. The plaintiff was acquainted with the locality. The track on which the Montgomery and Eufaula Railway Company received and discharged its passen-

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gers was nearest the depot-building, and farthest from the river. The plaintiff came in on the M. & E. railroad train, after night-fall, and left the train at the depot, without injury or complaint. As we have said, there was no controversy up to this point. The testimony of the plaintiff, not contradicted, is, that soon after leaving the train, he had occasion to seek a retired spot, and inquired of a person whom he did not know, if he knew where there was a privy. He made no other inquiry. The person inquired of pointed in a direction diagonally across the platform, towards the river side of the lower end of the platform, and told him there was one there. He went in search of it, missed the place, wandered into the dark beyond and below the platform as much as fifty feet or more, and fell over the bluff, suffering very serious injury by the fall. This is the *gravamen* of the present suit. There is proof that there was a privy in the direction indicated, but it was without a light, and was hidden from the light of the platform by an intervening house.

It is manifest, if there is any fault any where growing out of these facts, it is a mere non-feasance, without any of the elements which constitute a trap or pitfall. This, in a proper case, will fix a liability on the railroad, whose passenger is thus injured. It can extend no farther. No other railroad company owed the plaintiff any active duty, and hence could commit no tort in failing to do what it was under no obligation to do. There is no ground of recovery against either the South and North Alabama Railroad Company, or the Louisville and Nashville Railroad Company. As to them, plaintiff was a mere stranger or intruder.

It is contended for appellee, that it was the duty of the Montgomery and Eufaula Railway Company, whose passenger he was, to provide such accommodations for its customers; and the fact that none such was visible, lighted, or could be found, renders that road liable for the injury suffered in searching for it. It may be that, in cities and towns, such provision should be made for the travelling public, getting on and off trains. Such retreats, however, are not usually placed in public places, or lighted, except within inclosures, such as public hotels, cars &c. Too great publicity would stamp them somewhat with the character of a nuisance. It is now made the duty of railroad companies to provide such accommodations, whenever thereto required by order of the Railroad Commission.—Act approved February 23d, 1883.—Sess. Acts 154. This statute was enacted after the occurrence of the injury complained of in this suit, and may be treated as a legislative intimation, that, theretofore, the duty was at least doubtful. Counsel have made diligent search for authorities bearing directly on this

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question, and have found none. Their very careful and able briefs prove this. We ourselves have found no unerring guide for our pathway. We are, therefore, led to infer the present case is one of first impression. *Toomey v. London, B. & S. C. Railway Co.* (3 Common Bench, 146), and *McKone v. Mich. Cen. R. R. Co.* (51 Mich. 601), come nearest to the question, of any cases shown to us; but each of those cases went off on the doctrine of traps and pitfalls on grounds adjacent to the depot, where passengers would be likely to go. A remark, in the case of *Toomey*, *supra*, by Sir Edward Vaughan Williams, one of the justices—leading author of the great work on Executors and Administrators—shows that in England, as well as in this country, juries need to be cautioned, when charged with inquiry of damages against railroads, or other supposed wealthy corporations. Speaking of slight and shadowy testimony of negligence, on which plaintiff claimed the right to proceed before the jury (he had been non-suited), that learned jurist said: "Every person who has had any experience in courts of justice knows very well, that a case of this sort against a railway company could only be submitted to a jury with one result."

The precise question in this case is, not that no such accommodation had been furnished, but that it was not sufficiently lighted, or made visible, so that a passenger could, without danger, find it. We think the plaintiff has disarmed himself of the right to raise this question. Instead of inquiring of some railroad employee, he made inquiry of a mere stranger, and took upon himself the risk of finding the place. This, when, having knowledge of the place, he must have known, if he reflected, that he was near the bluff of the river. To put the question in its mildest form, we think the plaintiff's negligence and inattention contributed proximately, if it did not cause the injury he complains of.—*Welfare v. London & B. Railway Co.*, L. R., 4 Q. B. 693; *Crofter v. Met. Railway Co.*, L. R., 1 Com. Pl. 300.

We have not considered the question of the railroad's duty to provide such accommodation prior to, and independent of our statute on the subject. Be that as it may, that enactment has imposed the duty on the railroads, when thereto required by order of the Railroad Commission, and only when so required. Nor have we inquired whether plaintiff's rights as passenger had ceased, when he was safely discharged from the train.—*Schouler on Bailments*, 649; *Thompson on Carriers of Passengers*, 412 *et seq.* Upon these questions we decide nothing.

On the undisputed testimony in this case, the railroad com-

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pany was under no obligation to place a fence or guard at the bluff of the river, from which the plaintiff fell.

We need not apply these principles to the several rulings of the Circuit Court, as what we have said will furnish a sufficient guide for another trial.

Reversed and remanded.

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Bill in Equity by Purchaser, for Specific Performance.

1. *Purchase of lands by husband, with moneys belonging to wife's statutory estate.*—Although the wife can not repudiate an investment of her moneys by her husband, with her consent, in the purchase of lands for her, and recover the money invested; yet, where the husband purchases lands in his own name, and for his own benefit, using funds belonging to the separate estate of his wife, with her consent, in paying the purchase-money, the same principle applies as in case of any other purchase by a trustee with trust funds: she may charge the husband personally, or trace the money and claim the lands, or charge them with the repayment of her money used in their purchase; and she may assert this equity against all persons except a purchaser for value without notice.

2. *Same; conflicting equities of wife, and sureties and mortgagees of vendor.*—When an administrator sells land under a probate decree, becoming himself the purchaser, giving his note with sureties for the purchase-money, and executing to them, after the maturity of the note, but before he had obtained a conveyance under the order of the court, a mortgage on the lands for their indemnity; if he re-sells a portion of the lands to the husband of one of the distributees, who, with his consent, and with the knowledge of his sureties on the note, uses the wife's distributive share in part payment to the succeeding administrator; the sureties, having afterwards paid the balance due on the note, can not assert, as against the equity of the wife arising out of such use of her moneys, a superior right by subrogation, nor under the mortgage.

3. *Sale by mortgagee, not pursuant to power; rights of assignee.*—A sale of the lands by the mortgagee, not in pursuance of the power contained in the mortgage, is not a valid foreclosure, but operates only as an equitable assignment of the mortgage; and the assignee (or purchaser) acquires thereby no higher rights than the mortgagee himself possessed.

4. *Revision of chancellor's decision on evidence.*—The chancellor's decision on a disputed question of fact, as on the question of notice *vel non*, will not be disturbed by this court on appeal, unless the record clearly shows that it is wrong.

5. *Interest and hire; when wife can not recover.*—The husband being entitled, so long as he remains trustee of his wife's statutory estate, to receive the income of her property, and having power to transfer it; when the wife sues to recover her property which has been sold by him, she can not recover hire; and when she seeks, by bill in equity, to charge lands with the payment of her moneys used by him in its purchase, she is not entitled to interest.

[Sawyers v. Baker.]

APPEAL from the Chancery Court of Blount.

Heard before the Hon. THOMAS COBBS.

This case has been before this court on two former appeals, and may be found reported in 66 Ala. 292, and 72 Ala. 49. The original bill was filed on the 5th July, 1879, by Henry Baker alone (his wife being joined as a complainant with him after the remandment of the cause on the first appeal), against Columbus W. Boone, Thomas Sawyers and others; and sought the specific performance of a contract for the sale of a tract of land, which the complainant had bought from said Boone, a divestiture of the legal title out of the other defendants, who claimed under said Boone, the recovery of the possession, an account of the rents and profits, and other relief under the general prayer. The land was a part of a tract which had belonged to Josiah McCollum, deceased, who was the grandfather of Mrs. Baker, and she was one of the distributees of his estate. Said McCollum died in 1871, and letters of administration on his death were duly granted on the 18th October, 1871, to said C. S. Boone. Said administrator sold the lands, under an order of the Probate Court, becoming himself the purchaser, at the price of \$1,112.40; for which sum, as the bill alleged, "he executed his promissory note to the heirs of said estate, or to some of them, with said Thomas Sawyers and John Gamble as his sureties." The sale was reported to the court, and was confirmed by it on the 16th October, 1872; and on the 16th January, 1877, a conveyance was executed to him, under an order of the court, by H. A. Gillespie, his successor in the administration, the note for the purchase-money having been paid as hereinafter stated. Boone took possession of the land under his purchase, and in October, 1875, sold a part of the tract, particularly described in the bill, to the complainant, placing him and his wife in possession, as they alleged; "and they continued in the uninterrupted possession thereof until the spring of the year 1877, when they were dispossessed by Daniel Sandlin, one of the defendants to the bill, "under a judgment obtained in some sort of proceeding instituted in a justice's court." The purchase-money agreed to be paid by said Baker to Boone was \$550, and, according to the allegations of the bill, it was paid or settled in this way: "At the time your orator purchased said land, and during the time said trade was being consummated, it was agreed by and between your orator and said Boone, that your orator should see said H. A. Gillespie," the succeeding administrator *de bonis non*, "and receipt him for said sum of \$550, as the husband and trustee of his said wife, Rebecca Baker, and have said sum of \$550 placed as a credit on said Boone's note, or in some way cause said sum to be credited on said note; and in pursuance of said

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agreement, your orator did receipt said administrator *de bonis non* for said sum of money, as a part of said Rebecca's share of the estate of her said grandfather, and caused said note to be credited with said sum; and in this way and manner your orator and oratrix made full payment to said Boone for said land so purchased of him, all of which was done by and with the consent and approval of your oratrix, Rebecca Baker."

This was the complainants' title, as set forth in their bill; while the interest in the land asserted by the defendants was acquired in this manner. On the 7th November, 1874, after the maturity of Boone's note for the purchase-money, but before he had obtained a conveyance under the order of the court, he executed a mortgage on a part of the land including the portion sold to Baker, to said Sawyers and Gamble, to indemnify them against liability as his sureties on the note for the purchase-money; and on the 10th January, 1876, suit having been instituted on the note, he executed to them another mortgage, conveying the entire tract of land, for the same purpose. This mortgage, a copy of which was made an exhibit to the bill, contained a power of sale, authorizing the mortgagees to sell the lands, publicly or privately, at their discretion, "if said Boone fails to pay off said note, with interest and all costs, on or before suit and judgment on said note." On the 3d January, 1877, a judgment was recovered on said note in the Circuit Court of the county, in favor of said Gillespie as administrator *de bonis non*, against said Boone, Sawyers and Gamble, for \$589.12, with interest and costs, the balance due after deducting the credit of \$550, or about that sum. On the 23d January, 1877, Sawyers sold and conveyed the lands to said Daniel Sandlin, in consideration of \$902 in hand paid, which money was used in the payment and satisfaction of said judgment; and Sandlin was in possession, claiming under this conveyance, when the bill was filed.

A decree *pro confesso*, on the original bill, was entered against Gamble, who made no defense to the suit. Demurrers were filed by Sawyers and Sandlin jointly, which were considered by this court on the former appeal.—72 Ala. 49. Sandlin having afterwards died, the cause was revived against his heirs and personal representatives; and an answer was afterwards filed by them, jointly with said Sawyers. In their answer said respondents alleged, that said mortgages were executed by Boone to Sawyers and Gamble in pursuance and fulfillment of an antecedent promise, made verbally at the time they became his sureties on the note; that Baker had notice of this fact when he purchased a portion of the land, and always acknowledged that his purchase was subordinate to their rights under the mortgage; denied that the money paid by Baker belonged to

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his wife, but admitted that he made a payment of \$500, which was entered as a credit on Boone's note; and claimed that their rights and equities, both under the mortgages, and by subrogation on account of their payment of the judgment, were superior to the equity asserted by the complainants, of which they had no notice.

On final hearing, on pleadings and proof, the chancellor held that the evidence did not satisfactorily show that the entire amount of the agreed purchase-money, \$550, was paid by the complainants, or either of them, and therefore they were not entitled to a decree for the specific performance of the contract; but that it was satisfactorily shown that the payment of \$500 was made with the moneys of Mrs. Baker's statutory estate, being a part of her distributive share of her grandfather's estate, and that Sawyers and Gamble had received the benefit of that payment, in reduction of their liability on Boone's note, knowing the source from which it was derived; and that she was therefore entitled, under the general prayer of the bill, to a decree declaring a lien on the lands in her favor, for the amount so paid, with interest thereon; and he rendered a decree accordingly, citing the following cases: *Preston & Stetson v. McMillan*, 58 Ala. 84; *Munford v. Pierce*, 70 Ala. 458; *May v. Lewis*, 22 Ala. 646. The defendants appeal from this decree, and here assign it as error.

On the first argument of the cause, an opinion was delivered, affirming the judgment and decree of the chancellor; but, on application for a re-hearing by the appellants' counsel, that opinion was withdrawn, and the one here published was pronounced.

THOS. H. WATTS, HAMILL & DICKINSON, and GEO. H. PARKER, for appellants.—The first mortgage to Sawyers and Gamble conveyed the tract of land afterwards sold by Boone to Baker, and was executed in November, 1874, nearly two years prior to that sale. If Baker's purchase was made for his wife, her funds being used in the payment made, and she claims the benefit of the purchase, she must take it as a whole, and must comply with all the stipulations of the contract on the part of her husband; by which, as Boone testifies, he promised to pay off the debt to the estate.—*Carver v. Eads*, 65 Ala. 192. If Mrs. Baker has an equity to charge the land to the extent of her moneys invested in the purchase, her equity is not superior to that of Sawyers and Gamble under their first mortgage, of which she had constructive notice by its registration; and when they paid off the judgment recovered on the note for the purchase-money, they were entitled to be subrogated to the rights and lien of the estate upon and against the entire tract

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of land.—*Wood v. Sullens*, 44 Ala. 686; *Knighton v. Curry*, 62 Ala. 404; *Wallace v. Nicholl*, 56 Ala. 321. Although the sureties, Sawyers and Gamble, got the benefit of the \$500 paid by or for Mrs. Baker, that does not give her an equity superior to theirs arising from the payment of the residue of the entire debt, for which they and the land were bound before she acquired any rights.—*Judge v. Wilkins*, 19 Ala. 765.

JNO. W. INZER, *contra*.—Plaintiffs' possession was sufficient to charge all subsequent purchasers and mortgagees with notice of their rights and interest.—*Sawyers v. Baker*, 66 Ala. 292; *Brunson v. Brooks*, 68 Ala. 248. The note on which Gamble and Sawyers became sureties for Boone, imposed on them no legal liability, since the administrator, their principal, occupied the position of both creditor and debtor; and the mortgage given for their indemnity was without legal consideration, and was given before Boone had acquired any title to the land. The sureties received the benefit of the payment made by Mrs. Baker, knowing that the money was hers; and their subsequent payment of the residue of the debt, which alone gives them any standing in court, does not make their lien superior to hers. That the court might declare a lien in favor of Mrs. Baker, and charge the land with its payment, under the general prayer, see *Preston & Stetson v. McMillan*, 58 Ala. 84, and other cases cited by the chancellor.

CLOPTON, J.—On the application for a re-hearing, we have re-examined and re-considered the pleadings and proof, in connection with the decree of the chancellor.

It may be conceded that a married woman is not entitled to recover money, though the *corpus* of her statutory separate estate, which her husband has used, with her concurrence, in the purchase of lands for her. It being the duty and right of the husband, as trustee, to invest the money of his wife so as to make it productive, she will not be permitted to repudiate as void an investment made for her by her consent, the benefits of which she received. If the present was a case of an investment made by Baker for his wife, with her concurrence, the principles pressed by counsel might be applicable. If Mrs. Baker's rights were acquired through, and were dependent on the contract of her husband with Boone, the performance of its terms and conditions on her part would be preliminary and antecedent to the enforcement of such rights, unless there were special circumstances modifying the rule.

But such is not the case made by the pleadings and proof. The lands were purchased from Boone by Baker, for himself, and in his own name, though he used in payment, or part pay-

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ment, the distributive share of his wife in her grandfather's estate, with her consent. The case presented is that of a trustee having invested money in the purchase of lands in his own name. No principle is better established in courts of equity, than that if a trustee invests money, under his control in a fiduciary capacity, in the purchase of lands, the *cestui que trust* may charge the trustee personally, or trace the money, and claim the lands, or charge them with its payment. It has been uniformly held, that this rule is applicable to the investment by the husband, of the statutory separate estate of the wife, in lands; and when the husband uses money belonging to the separate estate of his wife, in the purchase of lands, taking the conveyance in his own name, the wife may claim the lands, or charge them with the payment of the money: an equity is created in her favor. This equity may be asserted against all persons, except purchasers for value without notice.—*Tilford v. Torrey*, 53 Ala. 120; *Nettles v. Nettles*, 67 Ala. 599.

There can be no question, that Baker purchased the lands from Boone in his own name, and that he paid for them with the distributive share of his wife, which was her statutory separate estate; the conveyance to be made to him, when his vendor was in condition to make a deed, or cause one to be made. An equity thereupon arose in favor of Mrs. Baker, which a court of equity will enforce, unless prevented by prior and existing, or supervening rights of third persons. It is insisted, that the rights of the sureties of Boone on his note for the purchase-money, under the mortgage of November 7, 1874, are superior to the equity of Mrs. Baker, and that they also have a superior right by subrogation. The lands of the estate of McCollum were sold by Boone, as administrator, in 1872, under an order of the Probate Court, on a credit until January 1, 1874, and were purchased by himself. Sawyers and Gamble were the sureties on his note for the purchase-money. After the maturity of the note, on November 7, 1874, Boone, without any present or new consideration, executed to his sureties, for their indemnity, a mortgage on a part of the lands purchased by him, being the land in controversy. Afterwards, Boone sold the mortgaged lands to Baker, on the agreement that Baker should apply his wife's distributive share, to the amount of \$500.00, in payment; Boone having previously resigned, or having been removed as administrator, and Gillespie having been appointed administrator *de bonis non*. Thereupon, Baker receipted Gillespie for his wife's distributive share, and the amount was credited on Boone's note. The sureties, in 1877, paid the balance of the note.

At the time the mortgage was executed, no conveyance of the lands had been made to Boone. A conveyance was not

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made until after the full payment of the purchase-money, in January, 1877. Until then, the legal title remained in the heirs of McCollum, one of whom was Mrs. Baker. The mortgage conveyed only Boone's equity. The equity of the mortgagees can not prevail against the equity of Mrs. Baker, supported by her legal title, under the special circumstances of this case. The mortgagees were liable for the entire purchase-money due by Boone, and were not authorized to make the mortgage security available, until judgment was rendered on the note, and Boone made default in its payment. Nearly one-half of the principal of the note was paid with the distributive share of Mrs. Baker. The sureties took the benefit of this payment, with notice of the source and mode of payment. In such case, they will not be permitted to enforce the lien on the same land, against the equity of Mrs. Baker, for the payment of the balance of the note, and thus obtain a double realization and indemnity from the same security. Such was the rule applied in this case on a former appeal.—*Sawyers v. Baker*, 72 Ala. 49.

The contract of sale between Boone and Baker was in parol. Conceding, as the answer of defendant claims and alleges, that Baker was never put in possession by the seller, and never was in possession, the contract of sale was void under the statute of frauds; and Mrs. Baker was entitled to recover from Boone the money paid, in an action at law. The mortgagees, when with notice they took advantage of the payment, and received and accepted a discharge, *pro tanto*, from liability as sureties on the note for the purchase-money, ratified the payment, subject to all its equities and burdens. Being a payment made by a trustee with trust funds, from which the *cestui que trust* received no benefit whatever, the equity of the *cestui que trust* is to charge it on the land, in which it was invested. If the sureties did not intend to hold the land for further and future indemnity against liability for the unpaid portion of the note, subject and subordinate to this equity, they should have promptly disaffirmed the payment on receiving notice. But, having availed themselves of its benefit, with knowledge of its character, the court will not maintain in their favor an equity, either under the mortgage, or by subrogation, superior to the equity of Mrs. Baker, with whose money the payment was made, and who would have been entitled to, and would have received, as an heir, her portion of the entire purchase-money, had it been paid by the sureties.

The conveyance to Boone in 1877, under an order of the Probate Court, vested in him the legal title. The sale by Sawyers to Sandlin was not made, so far as disclosed by the record, in pursuance of the power contained in the mortgage,

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and, consequently, was not a valid foreclosure. The only effect which the sale and conveyance to Sandlin can have, is to operate an equitable assignment of the mortgage. As such assignee, he acquired no higher or other rights than the mortgagees possessed.—*Sloan v. Frothingham*, 72 Ala. 289.

We have assumed, that the mortgagees and Sandlin had notice of the equity of Mrs. Baker, for the reason, that the chancellor so found on the evidence. There is not a decided preponderance of evidence against his conclusion. Considering the conflict in the testimony, the chancellor might have reasonably attained either conclusion. We will not disturb his finding on a question of fact, unless we see clearly it is wrong. *Marlow v. Marlow*, 52 Ala. 113.

The chancellor erred, however, in decreeing that Mrs. Baker be allowed interest. The husband alone, so long as he remains trustee, is entitled to receive, and may transfer, the income of his wife's statutory separate estate. When suit is brought on a promissory note, or for the detention of property, the *corpus* of her statutory separate, in the name of the wife, interest or hire, being a mere incident of the suit, is recoverable.—*Pickens v. Oliver*, 29 Ala. 528. But, when a married woman brings suit to recover property belonging to her statutory separate estate, which has been sold by her husband, or brings her bill to charge land with the payment of money which has been used by him in its purchase, she is not entitled, in the one case, to recover hire, nor interest in the other.

Whitman v. Abernathy, 33 Ala. 154; *Ryall v. Prince*, 71 Ala. 66. The extent of Mrs. Baker's equity is to have the *corpus* of her separate estate restored.

The judgment of affirmance is set aside, the decree of the chancellor is reversed, and a decree will be here rendered in accordance with this opinion. Costs of appeal will be divided between appellants and appellees.

Todd v. McCravey's Adm'r.

Equitable Attachment and Garnishment; Claim of Exemption.

1. *Claim of exemption against garnishment; where filed.*—When a garnishment is levied upon any personal property other than money or *choses in action*, a claim of exemption thereto "must be lodged with the officer making the levy" (Code, § 2834); but, when the levy is upon "any money or *choses in action*" (*Ib.* § 2842), the claim of exemption must be filed, verified by affidavit, in the court where the proceeding is

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pending; and it may be interposed at any time before the debt is condemned in the hands of the garnishee, but subject to reasonable regulation by the court.

2. *Burden of proof as to exemption.*—A “declaration and claim of exemption,” duly made and filed for record on the Probate Court, is *prima facie* correct (Code, § 2831), and imposes on a contesting creditor the *onus* of establishing its incorrectness, or invalidity; and when its validity depends on the time when the debt was contracted, the creditor must affirmatively prove the time for which he contends.

3. *Exemption; by what law determined, and value in 1867.*—As against the claims of creditors, the extent and amount of exemptions are to be determined by the law which was of force when their debts were created; and under the laws which were of force prior to the 19th February, 1867, a debt or money in the hands of a garnishee could not be claimed as exempt.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. N. S. GRAHAM.

The appeal in this case was sued out from a decree dismissing and disallowing a petition and claim of exemption, which was interposed by the appellant, Mrs. Susan S. Todd, one of the defendants in a pending chancery suit, to a fund of \$267.75, which was paid into court by S. J. Kennerly & Co., garnishees in the cause. The bill in that case was filed on the 9th February, 1878, by L. W. McCravey, as the administrator of the estate of B. F. McCravey, deceased, against Mrs. Todd and her two children; and sought to subject her interest in certain real estate, particularly described, to the satisfaction of a debt due to the estate of said B. F. McCravey, for work done and materials furnished in making certain improvements and additions to a dwelling-house in Huntsville, which constituted a part of said real estate. Kennerly & Co., who were in possession of a part of the property as the tenants of Mrs. Todd, were made defendants to the bill, and a garnishment was prayed against them as her debtors. The principal facts of the case are stated in a former report of the case, on appeal sued out by the complainant.—66 Ala. 315–26.

The complainant's debt was evidenced by a bond, or promissory note under seal, for \$491.45, dated June 26th, 1868, and signed by Mrs. Todd and her husband; which recited as its consideration “lumber and labor received of him [said B. F. McCravey] in building and repairs on the residence,” particularly describing it. The bill alleged that, at the time the improvements were made, Mrs. Todd was a married woman, the wife of D. H. Todd, who died July 30th, 1871; and as to the time when the work was done, it contained these allegations: *Par.* 1. “That his said intestate was a carpenter by trade, and as such, *in the year 1866*, made improvements to the amount of \$491.45 upon the residence of the said defendant.” *Par.* 5. ‘Said improvements consist of all the carpenter's work on the

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new addition to the dwelling-house, which said addition was built on the north end of the original building *during the years 1867 and 1868.*" *Par. 6.* "At the time said improvements were made, said defendant, Susan S. Todd, owned another lot or parcel of land," particularly describing the store-house and lot occupied by said Kennerly & Co.; "which lot or parcel of land she acquired by conveyance from her father, Daniel B. Turner, *on the 26th March, 1866.*"

The record does not show at what time the money was paid into court by the garnishees. In her petition asking that the money be declared exempt and paid over to her, which was verified by affidavit, and filed in the cause on the 8th July, 1881, Mrs. Todd stated that, on the 22d January, 1881, she "filed in the Probate Court of said county a claim of exemptions, with schedule attached, which is duly recorded in said court, and a copy of which is hereunto attached as an exhibit, and its allegations are here repeated;" that she owned no personal property except that described in said claim and schedule, which included the money in the hands of the register; "and that the work done and lumber furnished by complainant's intestate was done and furnished in the year 1867." The complainant filed an answer under oath to the petition, in which he alleged that his debt "was contracted in the year 1866;" and he insisted that the petition should be dismissed and disallowed, "because no claim in writing and under oath, as provided by section 2828 of the Code of Alabama, was lodged with the officer making the levy of the garnishment in this case, as required by section 2834 of the Code."

The complainant's own affidavit was submitted on his behalf, in which he stated "that said debt was contracted in the latter part of the year 1866, and the book-account of complainant's intestate shows that the contract for said improvements was made in 1866." Mrs. Todd's affidavit was submitted in her behalf, in which she stated "that said debt was not contracted in 1866, but said work was done and said lumber furnished by said B. F. McCravey during the year 1867, between the months of May and December." These affidavits were admitted, by consent, as the depositions of the parties. The cause being submitted on the petition and answer, with these affidavits, and the exhibits, the chancellor disallowed the claim of exemption, and dismissed the petition; and his decree is now assigned as error.

D. D. SHELLBY, for appellant.

HUMES, GORDON & SHEFFEY, *contra.*

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SOMERVILLE, J.—Section 2842 of the present Code (1876) provides, that whenever any money, or *choses in action*, are levied on by process of garnishment on any attachment, judgment, or summons and complaint, and the defendant in such attachment, or other process, “claims the same, or any part thereof, as *exempt* from such levy, he shall file such claim in writing, verified by his affidavit, in [the] court where such proceedings are pending, setting forth what other personal property, if any, he has, specially, where the same is, and its value; or, if he has none, stating that fact.” It is further provided, that such claim may be contested, in the same mode as other cases of contestation are conducted.—Code, 1876, § 2842. The present case is one where the claim of exemption is interposed to certain rents due by a garnishee, in an equitable garnishment, to the defendant in a chancery suit. The claim of exemption was therefore properly filed in this court, where the proceedings were pending, and which alone had jurisdiction of the matter. Section 2834 of the Code, requiring such claim in writing to be “lodged with the officer making the levy,” in certain cases there provided for, has reference only to cases where other personal property than money or *choses in action* is levied on—property of a tangible nature, such as ordinarily is the subject of levy and sale under execution. That section was not intended to include cases where money or *choses in action* are attached by garnishment, when, in our opinion, the statute clearly intends to authorize the interposition of a claim of exemption at any time before a condemnation of the debt in the hands of the garnishee; subject, of course, to reasonable regulation by the court having jurisdiction of the proceedings. *Henderson v. Tucker*, 70 Ala. 381; *Sherry v. Brown*, 66 Ala. 51; *Daniels v. Hamilton*, 52 Ala. 105.

The appellant is shown to have previously filed her “declaration and claim of exemption” for record in the Probate Court, in due form, as authorized by section 2828 of the Code. This is made by statute “*prima facie* evidence of the correctness of such claim.”—Code, § 2831. The burden of proof was, therefore, cast on the contestant, to show that his alleged grounds of contestation were correct, and that the debt was subject to the process.—Code, § 2838. The issue of fact raised before the chancellor, upon which this was made to depend, among other things, was, whether the debt due McCravey was created prior to February 19, 1867, or after that date. If prior to this date, the rents were subject to the garnishment process, and the exemption claim was untenable. If subsequent to it, the reverse would be true.—Code, 1876, § 2844; Code, 1867, § 2884; *Peevey v. Cubaniss*, 70 Ala. 258; *Fearn v. Ward*, 65 Ala. 33; *Nelson v. McCreary*, 60 Ala. 301.

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We have examined the testimony in the case, and are of opinion that it clearly preponderates in favor of the view, that the debt in question was created during the year 1867, and subsequent to the nineteenth day of February. We have in favor of this fact the testimony of the defendant, with some very strong and probable implied admissions in the complainant's bill, aided by the *prima facie* legal presumption that the property is exempt until the contrary is proved. Against this is opposed only the naked assertion of the complainant, who is not shown to have any knowledge of the fact, except such as he seems to have derived from "the book of account" of his intestate. It is not made to appear in whose hand-writing such entry was made, nor are any facts stated from which the inference can be justified that it was made contemporaneously with the event to which it purports to relate.—*Dismukes v. Tolson*, 67 Ala. 386; *Union Bank v. Knapp*, 15 Amer. Dec 181; 1 Greenl. Ev. §§ 118–120. This was unsatisfactory, especially in view of repugnant admissions in the bill.

The decree of the chancellor is reversed, and a decree will be rendered in this court, adjudging the issue on the contestation of the exemption against the complainant, and in favor of the defendant, Mrs. Todd, and vacating the garnishment proceedings. The said defendant is adjudged to be entitled to the amount of rents in the hands of the register, which will be paid to her under the order of the chancellor. The costs of this appeal, and of the exemption contest in the Chancery Court, will be taxed against the appellant. The garnishee will be discharged, with his reasonable costs.

Harden v. Darwin & Pulley.

Bill in Equity for Foreclosure of Mortgages; Cross-Bill for Cancellation.

1. *Contracts between husband and wife, at common law.*—At common law, all contracts between husband and wife were prohibited, and a conveyance of property by the wife to the husband directly was void; but a married woman was not incapacitated to act as trustee, express or implied, and she might, in the exercise of a power as trustee, make a conveyance to her husband, which a court of equity would sustain as if made to a third person.

2. *Same, under statutory provisions.*—The capacity of the wife to make contracts is not enlarged by the statutory provisions creating and regulating the estates of married women, and contracts between her and her husband for the sale of property are prohibited (Code, § 2709); yet she

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may, as at common law, execute a power as trustee in his favor, or be declared a trustee *in invitum* at his instance.

3. *Estoppel against married woman.*—The deed of a married woman, conveying property belonging to her statutory estate, if executed in any other manner than that prescribed by law, or founded on a consideration not sanctioned by law, does not estop her from asserting its invalidity, and asking its cancellation; and though she might be estopped from denying the validity of an act done under a power, and within the scope of her authority as trustee, the precedent inquiry would remain, whether she performed the act in the capacity of trustee.

4. *Purchase of lands with joint moneys of husband and wife; resulting trust, and voluntary partition.*—When lands are purchased and paid for, partly with the moneys of the husband, and partly with moneys belonging to the statutory estate of the wife, the title being taken in her name, a resulting trust may be established in favor of the husband, to the extent of his moneys so invested, by proof repelling the presumption of an advancement or provision for the wife; and if the parties voluntarily execute a deed of partition, reciting the facts, a court of equity will sustain and enforce it against the wife or her heirs, "so far as the partition clearly appears to be fair and just;" but, if two separate tracts of land are so bought, at different times, and by distinct contracts, and by the deed of partition one tract is assigned to each, thereby effecting a partial exchange, a court of equity will not enforce it against the wife or her heirs, though it might be sustained "when shown to be equitable and for the benefit of the wife."

5. *Same; recitals of deed.*—The recitals of the deed of partition in such case, if made deliberately and freely, are entitled to great weight, but are not conclusive; and when it is shown as here, that they are untrue in fact, that the partition was not equitable, fair and just, and that it was procured by undue influence and other improper means while the wife was an invalid, a court of equity will cancel and set it aside, at the instance of her heirs, although it is not shown that the entire purchase-money was paid by the wife.

6. *Same; when mortgagee is not entitled to protection as purchaser without notice.*—If, in such case, the lands assigned to the husband, by the deed of partition, are afterwards mortgaged by him and his wife, as security for his debt, the mortgagee can not claim protection as a *bona fide* purchaser without notice, on account of the recitals of the deed of partition, but is charged with notice of all the facts shown by the records of the Probate Court, relative to the purchase by the wife at an administrator's sale, which is mentioned in the deed.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. N. S. GRAHAM.

The original bill in this case was filed on the 5th December, 1879, by Darwin & Pulley, merchants and partners in trade, and sought, principally, the foreclosure of a mortgage on a tract of land, executed to the complainants by Benjamin L. Harden and his wife, Mrs. Anne E. Harden, both since deceased; also, the foreclosure of a prior mortgage on the same tract of land, executed by said Harden and wife to Mrs. Mary B. Miller, an account of the mortgage debts, a sale of the land for the satisfaction of both debts, and general relief. The personal representative and the children of said Benjamin L. Harden, with Mrs. Miller, were made defendants; the children, who were infants, being also devisees under the will of their

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mother. The complainants' mortgage was dated the 8th March, 1876, and was given to secure the payment of said Harden's promissory note for \$1,500, which was of even date with the mortgage, and payable on the 1st December, 1876. The mortgage to Mrs. Miller was dated the 24th September, 1873, and recited an indebtedness of \$1,704.55, as evidenced by said Harden's promissory note, of even date therewith, and payable on the 1st November, 1874.

The tract of land conveyed by these mortgages, called the "Nance land," was then occupied by said Harden and his wife, and was acquired by purchase at a sale made on the 23d October, 1867, under an order of the Probate Court, by the administrator of the estate of Giles Nance, deceased; the purchase being made in the name of Mrs. Harden, and conveyance being executed to her, under the order of the court, on the 29th January, 1870, when the payment of the purchase-money was completed. The land was claimed by said Benjamin L. Harden as his own, under a deed of partition executed by and between him and his wife, dated December 7th, 1872, and attested by two witnesses, which was in the following words: "*Whereas*, Benjamin L. Harden, of said county, at a sale made by Benjamin R. Nance, as administrator with the will annexed of Giles Nance, in the name of his wife, Anne E. Harden, purchased the following described parcels of land," describing the lands, "at and for the sum of \$2,820; *and whereas* the said Benjamin Harden, having fully paid the purchase-money, on the 29th day of January, 1870, received of said Nance, as such administrator, a deed conveying the said lands to the said Anne E. Harden, which deed is of record," &c.; "*and whereas*, on the 11th day of January, 1869, the said Benjamin Harden purchased of one N. P. Wilburn the following described land," describing it, "and having fully paid the purchase-money thereof, the sum of \$1,600, received from said N. P. Wilburn and wife a deed conveying the said lands [to] the said Anne E. Harden; *and whereas*, on the purchase of said lands first above described, the said Benjamin L. Harden used \$1,000, the separate estate of his wife, paying the remainder of the purchase-money from his own individual moneys; *and whereas*, on the purchase of said land above described from said N. P. Wilburn, the said Benjamin L. Harden used the sum of \$600, the separate estate of his said wife, paying the remainder of the purchase-money from his own individual moneys; *and whereas* the two sums so used by Benjamin L. Harden, \$1,000 and \$600, constitute the entire separate estate of said Anne E. Harden; *and whereas* the said deeds were made to her solely for the purpose of securing to her the said moneys belonging to her, so used in the purchase of said lands, and not to invest her with

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an absolute title thereto; *and whereas* the said Benjamin L. and Anne E. are anxious to avoid the expense and delay of a suit in chancery to divest said Anne E. of any other right, title, claim or interest in said lands, than such as might be necessary to secure to her the payment of the said sum of \$1,600; *and whereas* the said lands conveyed to the said Anne E. by the said N. P. Wilburn are of the value of \$1,000, and the said Anne E. is desirous of holding and retaining the said lands so purchased of said N. P. Wilburn, free and exempt from all claim thereon which her husband, the said Benjamin Harden, could or might prefer, by reason of the facts hereinbefore recited, and by reason of any claim he could have thereon as her husband; *and whereas* the said Benjamin L. is willing to release the said Anne E. of all claim which she could have on said lands, by reason of his payment of part of the purchase-money thereof, and all right or claim he could have thereon or thereto as her husband, on her releasing, surrendering, and conveying to him all the right, title, claim and interest in the lands first above described, conveyed to her by the said Benjamin R. Nance: *Now this indenture witnesseth*, that the said Anne E. Harden, for and in consideration of the premises, has released, relinquished, surrendered and conveyed, and by these presents doth release," &c., "unto the said Benjamin L. Harden, the said lands above described as conveyed to her by the said Benjamin R. Nance, together with the right *to have* (?) by reason of the conveyance aforesaid of the said Benjamin R. Nance; and the said Benjamin L. Harden, for and in consideration of the premises, and the release of the said Anne E., hath released, surrendered and conveyed, and by these presents doth surrender and convey, unto the said Anne E., her heirs and assigns forever, all the right, title, claim and interest, which he could or ought to have, in and to the lands above described as purchased of the said N. P. Wilburn, and conveyed by him to the said Anne E., by reason of the payment by him (said Benjamin L.) of \$1,000 of the purchase-money thereof; and the said Benjamin L. doth here now renounce, surrender, relinquish and release, unto the said Anne E., all right, title and claim to the possession of said lands, and all right, title and claim which he might or could have in said lands as the husband of the said Anne E., whether as tenant by the curtesy or otherwise; and the said Benjamin L. doth further covenant and agree, to and with the said Anne E., that she shall have and hold the said lands last above described to her sole and separate use, free and exempt from all claim therein or thereto which he now has, or can have, or might or could hereafter have, as husband of the said Anne A. *In witness whereof*," &c.

A copy of this deed, and also copies of the mortgages, were

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made exhibits to the bill. Letters of administration on the estate of said Benjamin L. Harden were granted on the 17th September, 1879. Mrs. Harden also died before the bill was filed, and her last will and testament was admitted to probate on the 16th February, 1878. The will was executed on the 22d September, 1876, and contained these provisions: "I give and bequeath to my two children, Luty Walker and Henry Turner Harden, the tract of land purchased of N. P. Wilburn and wife," particularly describing it; "also, my entire interest in any other real estate I now possess, or may hereafter belong to my estate. The land purchased of N. P. Wilburn was paid for with my individual money. I also give to my two children, above named, my entire personal estate of all kinds. I desire that my dear husband, Benj. L. Harden, shall manage and control the property for my dear children, without giving bond, and direct that none of my estate shall be held in payment of his debts. In witness whereof," &c.

An answer to the bill was filed by the guardian *ad litem* of the infant defendants, denying the validity of the mortgages, and of the deed of partition, and alleging that the said "Nance land" in fact belonged to Mrs. Harden as her statutory estate; that it was bought in her name, paid for with her money, and the title conveyed to her under the order of the court; that the deed of partition was a contrivance intended to put the title to the land in said Benj. L. Harden, so that he might mortgage it for his debts, and to enable him to borrow money; and that Mrs. Harden was induced to join in its execution by the persuasion, influence, and threats of her husband. A demurrer was incorporated in the answer, assigning several specific grounds; which demurrer was overruled by the chancellor, and his decree was affirmed by this court on appeal.—See the case reported in 66 Ala. 55–64, where the several causes of demurrer are stated.

Afterwards, on the 5th July, 1881, the answer of the guardian *ad litem* was amended, by adding the following allegations: "From the year 1871 to the year 1876, when said Anne Harden died, she was an invalid, confined to her room and bed, and, during all of said time, was completely dominated and controlled by her said husband in all business matters; and respondent alleges, on information and belief, that she did not sign the deed to her husband, the mortgage to complainants, nor the said mortgage to Mary B. Miller, of her own free will and voluntarily, but that she was forced, coerced, or compelled by her said husband to sign them; that the recitals of said deed to her husband, of date December 7th, 1872, are untrue; that said deed and mortgage are a cloud upon the title of said infants to said real estate, and that said Anne Harden was forced to

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sign said papers without legal advice, and without opportunity for legal advice." It was therefore prayed that the answer be taken as a cross-bill, and that the deed and mortgages be cancelled and annulled. An answer to the cross-bill was filed by Darwin & Pulley, in which they denied all its averments assailing the validity of the deed and mortgage, and re-affirmed the facts alleged in the original bill; and they further claimed to be *bona fide* purchasers for valuable consideration, without notice of any defect in the title of said Benj. L. Harden.

The cause being submitted for decree on pleadings and proof, the chancellor dismissed the cross-bill, and rendered a decree for the complainants, foreclosing the mortgages as prayed. From this decree an appeal is sued out by the guardian *ad litem* of the infant defendants, and each part of it is assigned as error; and the administrator of the estate of Benj. L. Harden makes the same assignments of error.

D. D. SHELBY, for the appellants.—It was decided in this case, on the former appeal, that the deed between Mrs. Harden and her husband "should be sustained, so far as the partition clearly appears to be fair and just;" but it was further said, that the transaction, like all others between husband and wife, "will be scanned with a watchful and jealous eye"—that the facts alleged, as to payment of the purchase-money, "are required to be shown by clear and satisfactory evidence;" and that the *prima facie* presumption, arising from a payment of part of the purchase-money by the husband, would be, that he intended to make an advancement or provision for the wife.—66 Ala. 62. This is the scope and extent of the decision, and an application of these principles to the facts disclosed by the record will show error in the chancellor's decree. The title to the land, in each case, was taken in the name of the wife; and this raises a presumption, almost conclusive, that it was intended she should take the absolute estate, and not hold merely as trustee.—*Wimbish v. Loan Asso.*, 69 Ala. 579; *Wells on Property of Married Women*, § 226. The conveyance, in each case, being to the wife, the presumption arises, that her money was used in the purchase.—2 Bishop, M. W. 139-40; *Saunders v. Garrett*, 33 Ala. 454; *Stall v. Fulton*, 1 Vroom, N. J. 430-38; *Morrison v. Koch*, 32 Wisc. 254; *Bodget v. Ebbing*, 24 Miss. 245. Aside from the legal presumptions, it is affirmatively proved that the entire purchase-money of the "Wilburn land" (\$1600) was paid with her funds—with money due her from her brothers, and paid by them on the day the purchase was made; and as to this there can be no controversy. As to the "Nance land," in addition to the conveyance taken in her name, the records of the Probate Court show that she was reported as the purchaser,

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and that the conveyance was ordered to be made to her; the greater part of the purchase-money was paid with her funds; and as to the \$1,000 paid by her husband, his declarations at the time, as well as subsequent thereto, show that the purchase was made for her. It was not necessary, in support of the wife's title, to trace her funds into every part of the purchase-money; and the equity created in her by the husband's payment, under the circumstances, was irrevocable by him.—59 Ala. 580; 2 Bish. M. W. 140.

Against these legal presumptions, and this affirmative proof, the complainants rely on the recitals of the deed of partition, as conclusive. But, at common law, the deed of a married woman, conveying real property to her husband, is absolutely void.—*White v. Wager*, 25 N. Y. 328; *Kennemore v. Pyle*, 44 Ind. 275; *Preston v. Fryer*, 38 Md. 221. By statute, contracts between husband and wife are prohibited, and restraints are imposed upon the alienation of her statutory estate; and she has never been held estopped by her deed from showing that these statutory provisions were violated, and thereby recovering her property.—*Weil v. Pope*, 53 Ala. 585; *Hammond v. Thompson*, 56 Ala. 590; *Boyleston v. Farrior*, 64 Ala. 564; *O'Connor v. Chamberlain*, 59 Ala. 431; *Chapman v. Abrams*, 61 Ala. 108; *Blythe v. Dargin*, 68 Ala. 370. The doctrine of estoppel can never be invoked against a married woman, when she acts in an individual capacity.—*Gliddon v. Strupler*, 52 Penn. 400. Nor will an agreement to convey be enforced against her, “even when she acts as a trustee in making the contract.”—Pomeroy on Contracts, § 459, citing *Avery v. Griffin* (L. R. 6 Eq. 606), and *Nicholl v. Jones* (L. R. 3 Eq. 696); also, Hill on Trustees, ed. 1865, mar. 50. If the doctrine of estoppel could be invoked in such cases, an easy method is discovered for evading all the statutory restraints imposed upon the alienation of the wife's separate property.

The recitals of the deed of partition, then, being shown to be untrue in point of fact; the deed having been procured by undue influence, importunity, and the improper exercise of marital authority, which a court of equity will not sanction; and the partition being in itself unfair and inequitable, it will not be enforced against the infant children of the wife, under the principles established by the former decision. The children claiming, not a mere equity, but the legal title, the defense of *bona fide* purchase without notice can not be set up against them.—2 L. C. Eq. 64. Nor are the complainants entitled to protection as purchasers without notice, “against an equitable title of which they had no notice,” because the mortgages are not supported by a present consideration.—*Thames v. Rembert*,

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63 Ala. 561; *Wells v. Morrow*, 38 Ala. 125; *Boyd v. Beck*, 29 Ala. 703.

CABANISS & WARD, *contra*.—The equity of the bill was settled on the former appeal, and its material allegations are established by the evidence set out in the present record, without the aid of the presumption which this court indulges in favor of the chancellor's conclusion on a disputed question of fact. *Rather v. Young*, 56 Ala. 94. It is shown that Mrs. Harden's interest in her father's estate was only about \$1,600, which her brothers bought from her, February 1st, 1866, giving their note for \$1,613; and \$1,600 of this sum, nearly the whole amount, is traced into the purchase of the "Wilburn land," which was assigned to her under the deed of partition. No complaint was made of the partition while the parties to deed were living; and their conduct, subsequent to its execution, was consistent with its recitals. The cross-bill, seeking to set aside and cancel it, was not filed until after the legal questions presented by the demurrer were decided against the defendants. The appellants rely, mainly, on the testimony of Mrs. Harden's brothers, who fail to distinguish between personal knowledge and hearsay; and their testimony not only contradicts each other, but is contradicted by undisputed facts. Would Harden insist upon an unfair settlement, as they say, in the presence of his wife's brothers, and to them? Does it not indicate that he considered his demand just and fair? According to their testimony, they knew that Mrs. Harden was being unduly importuned and coerced into placing her property in condition to be mortgaged by her husband; and yet they neither protected her, nor gave information which would have prevented the deed from misleading innocent persons, who might deal with Harden on the faith of it as recorded. The provisions of Mrs. Harden's will corroborate the recitals of the deed, and accord with her conduct and admissions; and the conclusion is more reasonable, that her husband suggested it to prevent his life-estate in the "Wilburn land" from being subjected to the payment of his debts, than that it was executed in fear and distrust of him.

The recorded deed of partition was *prima facie* valid. 66 Ala. 62. Being valid on its face, and showing a contract fully executed, third persons might rely on its recitals with confidence.—*Gridley v. Wynant*, 23 How. 500; *Moog v. Strang*, 69 Ala. 98. If the recitals were not true, how or from whom could the complainants have ascertained the facts by inquiry? They were dealing with the only parties in interest, whose conduct was in accordance with the recitals of the deed; and any assurances made to them by Mrs. Harden would have been open

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to the same objections now urged against the deed and mortgage. That the extension of their debt was a valuable consideration for their mortgage, entitling them to protection, see *Mobile Life Insurance Co. v. Randall*, 71 Ala. 220.

CLOPTON, J.—It is conceded, that the common law does not incapacitate a married woman from being a trustee, either express or *in invitum*; nor is she disqualified to exercise judgment and discretion in discharge of the office, and in execution of any power devolved on her as such trustee, without the co-operation of her husband. While acting under a power, and within the scope of her authority, she may make a conveyance to her husband, as well as to a third person, which will be sustained in a court of equity.—*Gridley v. Wynant*, 23 How. 500; 2 Cord on Mar. Women, § 1396. On a former appeal, which was taken from a decree overruling a demurrer to the bill (66 Ala. 62), it was held, that where the purchase-money of land was paid with a mixed fund, partly the property of the husband, and partly the property of the wife, and the title taken in the name of the wife, a resulting trust may, in such case, be established in favor of the husband, for the part paid by him. It was further held, that on the allegations of the bill, which were admitted to be true by the demurrer, the mutual deeds, executed by the husband and wife, were designed to separate the relative interests of the parties; that Mrs. Harden must be regarded as conveying in her capacity as trustee, and that the deeds “should be sustained, so far as the partition clearly appears to be fair and just.” It was also said: “In view of the relation of the parties, and the influence which the husband exerts thereby over the conduct of the wife, all transactions of this, and in fact of every character between them, will be scanned with a watchful and jealous eye by courts of equity.”

The case now comes before us on appeal from the decree on the pleadings and proof; and the investigation must be addressed to a consideration of the deed of partition, and its recitals, in connection with, and in the light of the circumstances attending the purchases of the lands and the payment of the purchase-money, in order to ascertain whether the partition appears to be fair and just, when subjected to a close and vigilant scrutiny; in other words, whether Mrs. Harden has voluntarily done what she would have been compelled involuntarily to do. The deed of partition can not be sustained, unless, on the facts proved, it satisfactorily appears that she executed it in her capacity of trustee, either because of a resulting trust in his favor, or because, as alleged in the bill, and recited in the deed, she took and held the legal title for the purpose of

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securing to her the money belonging to her separate estate, which was invested in the lands.

If, by the legal effect and operation of the transactions, the lands, or a material, valuable, and tangible interest in each parcel, vested in Mrs. Harden; in such case, the common-law rule applies, which prohibits all contracts between husband and wife, and avoids any conveyance of her property to him directly. The rule rests on the unity of person, and on the presumption that the wife is under the control or coercion of the husband, and thereby deprived of freedom of action. While a court of equity will uphold, for the benefit of a married woman, many acts invalid at law, her acts, void at law for her protection, will not be sustained in equity, against her interests. *Rumfelt v. Clemens*, 46 Penn. St. 455; *White v. Wager*, 25 N. Y. 328; *Preston v. Fryer*, 38 Md. 221. Neither is her capacity, in this respect, enlarged by our statutes, which, in express terms, prohibit any contract between husband and wife for the sale of any property, and prescribe a particular mode for the sale and conveyance of her statutory separate estate—by an instrument in writing executed by both husband and wife, and attested by two witnesses, or properly acknowledged. The husband can not join in a conveyance to himself.—*Kinnamore v. Pyle*, 44 Ind. 275.

No question of estoppel is raised by the argument of counsel for appellees, and properly not. The case is clear of such complication. It has been uniformly held, that a married woman is not estopped from asserting the invalidity of a conveyance of her property, not executed in the mode required by the statute, though she has received a valuable consideration, and her vendee has been let into possession; and that a court of equity will not enforce it against her, as an agreement to convey; and also that the court will intervene, in the absence of fraud, duress, or imprisonment, to annul and cancel a conveyance of her statutory separate estate, by mortgage or absolute deed, in consideration of the debt of her husband.—*Blythe v. Dargin*, 68 Ala. 370; *Boyleston v. Farrior*, 64 Ala. 564. It may be, that she would be estopped from denying the validity of an act done under a power, and within the scope of her authority as trustee; but the precedent inquiry remains, did she perform the act in the capacity of trustee?

The purchases of the two parcels of lands were separate, distinct, and independent transactions; the "Nance land" having been purchased in December, 1867, for \$2,820.00, one-third cash, and the balance in one and two years; and the "Wilburn land" having been purchased in January, 1869, for \$1,600.00, paid at the time. For the deferred payments on the Nance lands, Mrs. Harden executed her bonds, with her husband and

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brother as sureties. There was no connection, directly or indirectly, between the purchases. A married woman has capacity, with the consent of her husband, to acquire lands by purchase; and her husband, as her trustee, may, with her concurrence, invest money, the *corpus* of her statutory separate estate, in the purchase of lands. Lands acquired by either mode are, by operation of law, the statutory separate estate of the wife. *Marks v. Cowles*, 53 Ala. 499; *Rainey v. Rainey*, 35 Ala. 282; *Sharp v. Sharp*, 76 Ala. 312. The deeds to the lands were made to, and in the name of Mrs. Harden. By the purchases, and the execution of the conveyances, the lands were, *prima facie*, her separate estate, and were absolutely so to the extent moneys of her separate estate were invested in the purchases. The rights and capacities of the parties are not governed by precisely the same principles, as if there had been a single purchase, or contemporaneous purchases of all the lands, the consideration-money contributed partly by each. If it be conceded that a part of the purchase-money of each parcel of land was paid by the husband, and there is a resulting trust in his favor; the trust is not single and common to both parcels, but separate trusts, charged severally on each parcel, for the amount of his money invested in the purchase of the particular parcel. If such were the facts, the deed of partition is not only an attempted execution of the trusts, but also an exchange of lands, and void to the extent it was an exchange; though equity may sustain such transaction, when shown to be equitable and for the benefit of the wife.

The consideration received by Mrs. Harden, for her release, surrender, and conveyance of the "Nance lands" to her husband, was, as recited in the deed between them, his release, surrender, and conveyance to her of all his right, title, claim, and interest in the "Wilburn land," by reason of his having paid one thousand dollars of the purchase-money. The evidence of the witnesses, Wilburn, D. H. Turner, H. P. Turner, and Humphrey, irresistibly forces the conclusion, that the entire purchase-money of the "Wilburn land" was paid with the proceeds of a note due to Mrs. Harden by her brothers, which was her statutory separate estate. The claim of her husband, that he paid a part of the purchase-money, is not colorable—is a mere pretence to give the appearance of equality in the partition. He had no claim or interest in the "Wilburn land," other than as husband and trustee. There was no resulting trust in his favor, and the fairness and justness of the partition is thus shown to be baseless.

The only opposing evidence is the recitals of the deed. These recitals, however conclusive they may be between parties *sui juris*, are not conclusive on Mrs. Harden, or her heirs, be-

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cause of her legal incapacity, and the presumed subordination of her will to that of her husband.—*Glidden v. Strupler*, 52 Penn. St. 400; *Drake v. Glover*, 30 Ala. 382. They are recitals of the considerations moving the parties, not contractual, and may be considered in the nature of admissions sufficient to make a *prima facie* case. If solemnly, deliberately, and freely made, they are entitled to great weight; but, if their force is impaired by reason of the manner in which they were procured, they should be accorded corresponding consideration. The evidence shows that Mrs. Harden was an invalid for several years preceding her death, and during a large portion of the time was confined to her bed; that he was persistent in his efforts to get her to convey to him the “Nance land,” threatening at times to take their son, and leave her in her afflicted condition, if she did not arrange it so he could raise money; and practiced other annoyances. His mother, who lived in the house with them, and whose natural instinct is to cover the misdeeds of her son as far as consistent with truth, testifies that she supposed Mr. Harden persuaded his wife to sign the deed—does not think she signed it willingly, and, while he did not deal harshly with her, he may have worried her into doing so.

As appropriate we quote the remarks of AGNEW, J., in *Rumfelt v. Clemens*, *supra*: “What assurance have we, in this, or in any case, that the agreement was not procured from her by threats, cruel treatment, or a course of petty annoyances amounting to an absolute constraint? The policy of the law, in this respect, is founded in a deep insight of the marriage relation, exposing the timid, shrinking wife to the storm of passion, the torturing reproach, or the heart-breaking unkindness of the husband.” This was said in the absence of evidence. Here, there is evidence showing, perhaps not the “storm of passion,” or the “torturing reproach,” but “a course of petty annoyances amounting to an absolute constraint,” and the unkindness of the husband to an afflicted wife, whose power of resistance was, probably, nearly exhausted by the wasting of disease. Admissions, obtained under such circumstances, can not overcome the clear, explicit, and positive statements of several unimpeached witnesses.

In respect to the payment of the purchase-money of the “Nance land,” the evidence is not so clear, explicit, and satisfactory. It tends to show, affirmatively, that Mrs. Harden paid a large portion,—more than the sum recited in the deed of partition; but we are without reliable or specific information by whom, or how the balance was paid. It is not shown that the separate estate of Mrs. Harden was sufficient to make the entire payment, without the use of the railroad stock, and

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there is no evidence that this was ever sold, or so appropriated. The evidence tends strongly to show that Mr. Harden was without means to make the payments. In such case, and under such circumstances, the wise and salutary presumptions of law, sanctioned by the experience of ages, must prevail. In 2 Bishop on Mar. Women, § 140, the author very properly observes: "As no man, in the complication of business affairs, could prove affirmatively what was the consideration which entered into the acquisition of every piece of property, and show it to be disconnected from every thing proceeding from his wife; so, in like manner, can no married woman, holding property, and managing it on her own account, trace affirmatively her separate ownership in the consideration paid for every thing she may justly claim as her own; and it would seem that, in substance, the same rules of evidence which protect the husband should be made available for the wife."

The purchase of the lands was in the name of the wife; she was reported by the administrator as the purchaser; the sale was confirmed as made to her; the receipt for the purchase-money was given as paid by her; on the payment of the purchase-money, the order of the court was made for a conveyance to her, and a conveyance was accordingly so made. These facts, in the absence of opposing evidence, are sufficient to show that the purchase was made, and the purchase-money paid by the wife.—*Saunders v. Garrett*, 33 Ala. 454; *Bodgett v. Ebbing*, 24 Miss. 245; *Morrison v. Koch*, 32 Wis. 254. These proceedings were in progress from December, 1867, the time of the sale, to January, 1870, when the conveyance was executed; and during this period, there is no claim or pretense by the husband that he had paid any portion of the purchase-money, or had any interest in the land; but, on the contrary, we have his admissions to the administrator, that the payments were made with moneys of Mrs. Harden's. No evidence was offered by the complainants that the husband paid any part of the purchase-money, other than the admissions of the deed of partition, the force of which we have considered. We attach no importance to the will. The "Wilburn land" is devised to her children, and also her *entire interest in any other real estate she then possessed*, or might thereafter belong to her estate. There was no other real estate, except the "Nance land," in which she could at that time claim an interest; and if the will proves anything, it tends to prove that she then claimed, or thought she had an interest therein.

The mortgagees can not claim the protection awarded to innocent purchasers. They knew that Mrs. Harden was a married woman. The records of the Probate Court and of the conveyances, and the deed of partition—links in their chain of

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title—which it was their duty to examine, were sufficient to put them on inquiry; and the pursuit of the inquiry with reasonable diligence would have brought to them knowledge of facts, showing the fallacy of the recitals in the deed of partition, the unfairness and injustice of the deed of partition, and the incapacity of Mrs. Harden to execute the deed to her husband.

The bill is filed for the single purpose of foreclosing the mortgages on “the Nance land.” There are no allegations of fraud in the purchase, or in the conveyance to Mrs. Harden. The title of complainants to relief is based on the validity of the deed to her husband. If it be conceded that the evidence is insufficient to show that all of the purchase-money was paid with moneys, the separate property of Mrs. Harden, and that a part was paid by the husband with his individual funds, the presumption is that it was an advancement; and an equity in the land was, by the purchase, vested in the wife, which, in the absence of fraud, became perfect on the payment of the purchase-money, and was, by the execution of the conveyance, converted into a legal estate. The legal estate “was irrevocable and indestructible, by any act of the husband subsequent to its creation.” Had the husband by any means become vested with the legal estate, he would have been a trustee for the wife.—*Wimbish v. B. & L. Asso.*, 69 Ala. 580.

The decree is reversed, and a decree will be here rendered denying the complainants relief, and setting aside and cancelling the deed of partition executed by Benjamin L. Harden and Anne T. Harden, December 7, 1872. The appellees will pay the costs of appeal in this court and the Chancery Court, and the costs of suit in the Chancery Court.

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Bill in Equity by Judgment Creditor, to set aside Conveyance as Fraudulent, and subject Lands to Satisfaction of Judgment.

1. *Estoppel en pais, by representations of debtor as to title of surety, his fraudulent grantee; voluntary and fraudulent conveyances.*—When a debtor, against whom a suit is pending, induces his creditor to dismiss the suit, to extend the time of payment, and to accept the notes of himself and a third person as his surety, on the representation that the surety is the owner in fee of a tract of land, which the debtor himself had bought and paid for, taking the title in the name of the surety for the

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purpose of defrauding his creditors ; as between the parties to the transaction, or their heirs, the facts are to be taken to be as they were represented to be ; the creditor having recovered separate judgments on the extended notes, against the debtor and his surety, and seeking, by bill in equity, to subject the land to the satisfaction of the judgment against the surety, which the latter had re-conveyed to his principal, the heirs of the latter are estopped from setting up the fraud under which the surety held the land, or claiming under the re-conveyance to their ancestor ; which re-conveyance, if voluntary, is void against the existing creditors of the grantor, and if executed with an intention to defraud the creditors of the grantor, the grantee participating in the fraud, is equally void and inoperative, though full consideration was paid.

2. *Multifariousness; statute of non-claim.*—A creditor, having recovered separate judgments against the principal debtor and his surety, and seeking by bill in equity to subject to the satisfaction of the judgment against the surety a tract of land to which he had the legal title when the debt was contracted, but which, in fraud of his creditors, he afterwards conveyed to his principal ; the bill is not multifarious because the heirs of the deceased principal are made parties, the legal title being vested in them ; and no relief being prayed as to the judgment against their ancestor ; nor can they set up the statute of non-claim as a defense, because that judgment has not been duly presented as a claim against his estate, within eighteen months after the grant of letters of administration, or nine months after the declaration of insolvency.

APPEAL from the Chancery Court of Jackson.

Heard before the Hon. N. S. GRAHAM.

The bill in this case was filed on the 7th September, 1883, by William R. Larkin, against Lemuel H. Lewis, and the personal representative, widow and children of Lemuel G. Mead, deceased ; and sought, principally, to subject to the satisfaction of a judgment, which the complainant had obtained against said Lewis, a tract of land which said Lewis had conveyed to said Mead in his life-time, in alleged fraud of his creditors. The tract of land, which contained two hundred acres, was conveyed to said Lewis by J. C. Outerbridge and wife, by deed dated October 27th, 1873, which recited the payment of \$4,000 as its consideration ; and it was conveyed by Lewis to said Lemuel G. Mead, by deed dated May 28th, 1875, which recited the payment of \$3,000 as its consideration. Afterwards, by deed dated March 26th, 1876, said Mead conveyed forty acres of the tract, with about ninety acres of another tract, to said Lemuel H. Lewis, in trust for Mrs. Mary F. Mead, the wife of said Lemuel G. Mead ; the consideration, as therein recited, being her relinquishment of dower in other lands which said Mead had sold and conveyed, his wife joining in the conveyances. Copies of these three conveyances were made exhibits to the bill, and it was alleged that Mead paid the entire purchase-money to Outerbridge, and had the title conveyed to Lewis, who was his nephew, for the purpose of hindering, delaying and defrauding his creditors ; that the conveyance by Lewis to Mead was without consideration, and was executed

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with the intent to hinder, delay and defraud the creditors of said Lewis; and that the subsequent conveyance by Meade to Lewis, in trust for Mrs. Mead, was without consideration, and was executed with the fraudulent intent of reducing the area of the tract of land, on which he then resided, so that he might claim the residue of the tract (one hundred and sixty acres) as a homestead exemption.

The complainant's judgment against Lewis was rendered in the Circuit Court of Jackson county, on the 8th March, 1879, and was founded on two bonds, or promissory notes under seal, executed by said Mead and Lewis jointly; each for \$634.92, dated December 4th, 1874, and payable one and two years after date. These notes were signed by Lewis as the surety of Mead, and were given in settlement and extension of a former debt, on which a suit in chancery was then pending, under circumstances stated in the opinion of the court, as alleged in the bill. Another judgment was recovered by the complainant on these notes, against said Mead, on the 26th October, 1877. It was alleged that an execution had been regularly issued on said judgment against Lewis, and returned "No property found;" that executions had been regularly issued on the judgment against Mead until his death, which occurred on the 14th January, 1878; that an execution, regularly issued after his death, was levied on the tract of land, which was thereupon claimed by the widow and children as a homestead exemption; that Lewis was insolvent, and that the estate of Mead had been reported and declared insolvent.

On these allegations, the bill asked the appointment of a receiver to take charge of the lands, and further prayed relief as follows: "That on the hearing said conveyance executed by said Lewis to said Mead on the 28th May, 1875, may be declared fraudulent and void as against your orator's said judgment of date 8th March, 1879; that the tract of land therein mentioned and described may be declared subject to the payment of said judgment, with all costs and interest thereon accrued; that your orator may have a money decree against said Lewis for said sum, with an order for the sale of said land for the satisfaction thereof; that said deed from said Mead to said Lewis, as trustee for said Mary F., of date March 20th, 1876, may be declared fraudulent and void; that the same may be cancelled, and said tract of land sold under a decree of this hon. court, freed from such cloud on the title, for the satisfaction of said judgment; and for all other and further relief," &c.

A demurrer to the bill was filed in the name of the infant defendants, by their guardian *ad litem*, assigning the following as grounds of demurrer: (1.) "Said bill attacks, as fraudulent, a deed from Lewis to Mead, and a deed from Mead to

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Lewis, and alleges that said deeds were executed to defraud complainant as the owner of a certain debt, secured by bond made by both Lewis and Mead ; and shows that the land would be equally liable and subject to said debt, whether held by Lewis or by Mead." (2.) "The bill shows that said tract of land consists of two hundred acres, and that one hundred and sixty acres thereof are exempt from execution, showing that only forty acres of the tract could be condemned, and said forty acres is not so described or identified as to enable the court to render a decree for its sale." (3.) "Said bill is vague and uncertain, in this : that it does not appear whether the pleader seeks to condemn the land as the property of said Lewis, or of said Mead ; nor whether he seeks to condemn it to pay the judgment against said Lewis, or the judgment against said Mead." (4.) "Said bill does not show that said alleged judgment against Mead was ever presented to his administrator, as a claim against his estate." (5.) "Said bill shows that said estate was duly declared insolvent, and does not show that said judgment was ever filed as a claim against said insolvent estate." (6.) "Said bill shows that the complainant has a full and complete remedy at law." (7.) "Said bill is multifarious, in seeking to collect two separate judgments, and in seeking a personal decree against Lewis, and attacking their several deeds as fraudulent." (8.) "Said bill seeks to condemn said land because fraudulently conveyed by Lewis to Mead, when it appears by the bill that Mead was in equity the owner of the land, and that Lewis really had no interest in it."

The chancellor sustained the demurrer as to the 4th and 5th grounds specially assigned, and overruled the others. The complainant appeals from this decree, and assigns as error the decree sustaining the demurrer as stated ; and by consent, entered of record, the guardian *ad litem* of the infants assigns as error the overruling of the demurrer on the other grounds specified.

R. C. BRICKELL, and J. E. BROWN, for appellant.

D. D. SHELBY, *contra*.

STONE, C. J.—Much that is found in the present bill appears to be unnecessary to a settlement of the questions sought to be raised. The history of the life-insurance, alleged to have been taken out by Mead on the life of his first wife, the purchase and various conveyances of the Outerbridge lands, Larkin's claim on Mead for moneys paid by him as surety to the Townsend estate, and the attempt by equitable proceeding, instituted by the former, to realize the sum for which the latter had become liable to him in consequence of said payment to

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the Townsend estate, out of the insurance money which fell due on the death of Mrs. Mead—these, it would seem, comprise all the bill need have shown, anterior to the making of the notes, which the present bill seeks to collect.

According to the averments of the bill, about the year 1870, Larkin paid, as surety for Mead, a sum of money between three and four thousand dollars. Before that time, Mead had taken out an insurance policy on the life of his wife, payable to himself, in the sum of ten thousand dollars, and had paid the annual premiums as they matured. For the purpose of defrauding his creditors, he, Mead, had procured the life-policy on his wife to be so changed, as that the loss, or insurance money, to fall due at her death, was made payable to Lewis, who was his nephew, a young man without means; and the money thus to be paid to him was in secret trust for the benefit of Mead. In 1873, Mead purchased the Outerbridge land, paid the purchase-money, four thousand dollars, and had the title made from Outerbridge and wife to Lewis, in like secret trust for Mead's benefit, and with like intent to defraud his creditors. Larkin instituted proceedings in the Chancery Court, to intercept the life-insurance money, and to have himself reimbursed out of it for the money he had paid the Townsend estate, as surety for Mead. Mead, with his family, lived on the lands which are the subject of this suit, while Lewis, in whom the title rested, was an unmarried man, and did not live on the lands. Thus matters stood, as the bill alleges, when negotiations and settlement took place, to be presently stated.

The further case made by the bill is substantially as follows: Mead desired and importuned Larkin to dismiss his said chancery suit, promising and agreeing, as inducement therefor, to give him good personal security, and offering said Lewis as such surety. As a reason why Larkin should accept Lewis as surety, Mead represented that he, Lewis, was amply solvent, and that he owned said Outerbridge lands in fee simple. Influenced by this persuasion, and relying on Mead's said representations, finding the title to be in Lewis, and not knowing that he, Lewis, had not paid Outerbridge for the lands, Larkin agreed to extend the said indebtedness of Mead one and two years, and to dismiss said suit, if Mead would execute to him notes, or bonds, with Lewis as surety, and payable at one and two years. The notes or bonds were executed by Mead and Lewis, bearing date December 4, 1874, due at one and two years, and being delivered to Larkin, he thereupon dismissed his said chancery suit.

In less than six months after this settlement, viz., May 28, 1875, Lewis, by deed of bargain and sale, reciting a consideration of three thousand dollars paid, conveyed the Outerbridge

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lands to Mead, thus leaving him, Lewis, without means to pay the said debt to Larkin. This, it is charged, was done without consideration, and with intent to delay, hinder and defraud Larkin and his other creditors. The notes or bonds not being paid, Larkin instituted suits against the makers, and recovered several judgments—the one against Mead, October 26, 1877; the one against Lewis, March 8, 1879. On these judgments executions have been issued, and returned “No property found.” Mead died in 1878; there has been administration on his estate, and the estate has been declared insolvent. No date is given in the bill, when administration was sued out, nor when the estate was declared insolvent. The bill fails to aver that the claim was ever presented to Mead’s administrator, or filed against the insolvent estate. The present suit was instituted September 7, 1883.

Before the judgment was rendered against Mead, he conveyed forty acres of the land to Lewis, in trust for his (Mead’s) wife. This left only one hundred and sixty acres in Mead, which is claimed as exempt homestead; and if rightly claimed, the estate having been declared insolvent, the title of the exemption is a fee, leaving nothing either in possession or reversion for Larkin. Hence his interest to have the property declared Lewis’, and not Mead’s. The bill seeks to have the lands condemned and sold as Lewis’ property.

One form of the defense set up is, that, according to the averments of the bill, Mead purchased and paid for the land, and had the title placed in Lewis in secret trust for him, Mead, in fraud of his (Mead’s) creditors; that when Lewis subsequently conveyed the land to Mead, he placed the title where it ought to have been; and therefore such conveyance can not be a fraud on the creditors of Lewis, no matter what his intention may have been. The following authorities are referred to as supporting this position: Bump on Fraud. Con. 223; Wait on Fraud. Con. §§ 176, 398; *Clark v. Rucker*, 7 B. Monroe, 583; *Davis v. Graves*, 29 Barb. 480; *Cramer v. Blood*, 48 N. Y. 684; *Stanton v. Shaw*, 3 Baxt. (Tenn.) 12. *E contra*, *Chapin v. Pease*, 10 Conn. 69. We will not decide this question. We will hereafter show why we need not express our views on it.

It will be remembered that, when Mead induced Larkin to dismiss his suit to subject the proceeds of the life-policy, and to extend time of payment on his notes or bonds with Lewis as surety, he succeeded in his wish and aim, on the representation that Lewis held a fee-simple title to the lands. On the strength of this representation, as the bill avers, Larkin was induced to dismiss his suit, materially altering his previous position, and to postpone his right of pressing his claim to speedy collection.

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This presents all the elements of an estoppel *en pais*. In *Montefiori v. Montefiori*, 1 Wm. Blackst. 363, Joseph Montefiori was engaged in a marriage-treaty, and, to promote his aims, Moses, his brother, gave him a note for a large sum of money, as the balance of accounts between them. No such balance existed. After the marriage, the note was returned to Moses; and the question was, whether the latter should make it good. Lord MANSFIELD said: "The law is, that where, upon proposals of marriage, third persons represent anything material, in a light different from the truth, even though it be by collusion with the husband, they shall be bound to make good the thing in the manner in which they represent it. It *shall be*, as represented to be." This was said more than a century ago. He added: "No man shall set up his own iniquity as a defense." In the leading case of *Heane v. Rogers*, 9 Barn. & Cress. 577, the principle is thus stated: "There is no doubt that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence against him; but we think that he is at liberty to prove that such admissions were mistaken, or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such case, the party is estopped from disputing their truth, with respect to that person, and those claiming under him, and that transaction."—See, also, *Hill v. Huckabee*, 70 Ala. 183; *Smith v. Caldwell*, at prevent term, *ante*, 157; Bigelow on Estoppel, 406, 475; Herman on Estoppel, § 409; *State, ex rel. v. Trustees*, 14 Ohio St. 569; *Burleson v. Burleson*, 28 Tex. 383.

Applying this principle to the case in hand, Mead, and those claiming in his right, unaided by anything else, are estopped from denying that Lewis, at the time the notes or bonds were executed, was owner of the lands in fee simple. As to them, he, Lewis, held the fee simple, unaffected by any fraud, or secret trust, attending its acquisition. The rule would be the same, if he had held the title for Mead, untainted by fraud. Lewis, then, being, as to this controversy, the *bona fide* holder and owner of the title in fee when he became bound for the debt to Larkin, the case is brought within the familiar principle, that a voluntary conveyance by one indebted, of property which can be the subject to seizure for his debts, is fraudulent *per se* as against existing creditors. Of course, if there be, in such case, an intention to delay, hinder or defraud, of which the grantee had knowledge, the conveyance would be alike inoperative, even though full consideration was paid.—2 Brick. Dig. 21, § 100; *Lehman v. Meyer*, 67 Ala. 396; *Lehman v. Kelly*, 68 Ala. 192; *Buchanan v. Buchanan*, 72 Ala. 55; *Zelnicker v. Brigham*, 74 Ala. 598. It results, that the man-

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ner of the acquisition of the land can exert no influence on the question of subjecting it to Lewis' debt, as being transferred by him to Mead in fraud of his creditors.

There is nothing in the argument that this bill is multifarious. As we have said, its purpose and prayer are, that the lands be sold in payment of the Lewis judgment. The title of the lands is in the Mead heirs. Hence the necessity of making them parties. We need not consider whether, if the bill had sought relief under both judgments, it would thereby have been rendered multifarious. The two judgments are for one and the same debt, and the one tract of land is the sole subject of the contention. It would be difficult to frame two bills applicable to the subject-matter. We decide nothing on this question. Nor need we decide whether or not the averments of the bill are such, that the question of non-claim, and the alleged failure to file the Mead judgment against the insolvent estate, can be raised by demurrer. Neither was necessary, in this attempt to subject the land to the payment of the Lewis judgment. We may add, if the averments of the bill are true, the conveyance of the forty acres of land to Lewis, in trust for the second Mrs. Mead, was without consideration and fraudulent, and she can not set up claim of *bona fide* purchase.

It results from the principles declared above, that none of the grounds of demurrer are well taken, and the chancellor erred in sustaining grounds numbered four and five. The question of homestead is not raised by this record, and we do not consider it.

On the appeal by Larkin, the decree of the chancellor is reversed, and here rendered, overruling said grounds of demurrer numbered four and five.

On the appeal by Mead *et al.*, there is no error in the record. Reversed and rendered, in case of *Larkin v. Mead et al.*

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Statutory Action in nature of Ejectment.

1. *Rights of assignee in bankruptcy.*—An assignee in bankruptcy, under the law of 1867, took the property of the bankrupt subject to all the legal and equitable claims of third persons, except in case of a fraudulent conveyance by the bankrupt.

2. *Sale of land by assignee, under order of court; rights of persons not parties.*—A sale of land by an assignee in bankruptcy, under an order of court, can not affect the rights of third persons, who are not made par-

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ties, and who have no notice, although their rights would have been concluded if they had been brought in.

3. *Same; heirs and administrator as parties.*—Where the bankrupt surrendered a tract of land which he had bought, not having paid the purchase-money, and having only received a bond for title; a sale of the land by the assignee, under an order of the court, does not affect the title of the heirs of the deceased vendor, who were not made parties, although the administrator was brought in.

APPEAL from the Circuit Court of Morgan.

Tried before the Hon. H. C. SPEAKE.

This action was brought by James D. Cain and others, children and heirs at law of James W. Cain, deceased, to recover a tract of land particularly described in the complaint, with damages for its detention; and was commenced on the 5th April, 1884. The defendants claimed title as sub-purchasers at a sale made in 1869 by C. C. Sheets, as assignee in bankruptcy of one Reuben Webster, under an order of the Bankrupt Court at Huntsville. Webster had bought the land from said James W. Cain, receiving a bond for title, but had never paid any part of the purchase-money; and these facts were stated in his schedules as a bankrupt. Said Cain had died in 1866, and his administrator was made a party to the petition for the order of sale; but no notice was given to the heirs. On the agreed facts, the court charged the jury that, if they believed the evidence, they must find for the defendants; and refused a general charge asked by the plaintiffs. Exceptions were duly reserved by the plaintiffs to each of these rulings, and they are now assigned as error.

W. P. CHITWOOD, and JAMES WEATHERLY, for the appellants, cited *Ray v. Nonsworthy*, 23 Wall. 137; *Marshall v. Knox*, 16 Wall. 551; *Broughton v. Mitchell*, 64 Ala. 210.

ROBERT C. BRICKELL, and C. C. HARRIS, *contra*.—(1.) The proceedings in bankruptcy for the sale of the lands were had in 1869, prior to the Revised Statutes of Congress, and are governed by the Bankrupt Law of 1867. The 20th section of that law authorized a sale of property surrendered by the bankrupt, incumbered by a "mortgage or pledge," or by "a lien," in such manner as the Court of Bankruptcy might direct. Bump on Bankruptcy, 6th ed., 415. (2.) The jurisdiction of the court to order a sale of the property of a bankrupt, subject to a lien or incumbrance, freed therefrom, transferring the lien or incumbrance to the proceeds of sale, which were brought into and subjected to the control of the court, was not doubted, and was frequently exercised.—Bump on Bankruptcy, 9th ed., 608; *Houston v. City Bank*, 6 How. (U. S.) 486. (3.) A sale was the act of the court,—not the act of the assignee. It could not

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be made without the order or decree of the court directing it; and the court would not proceed to order it, except upon the application of the assignee, setting forth facts and circumstances which justified a sale; and notice of the application must have been given to the creditor *having the lien* or incumbrance. *Ray v. Norsworthy*, 23 Wall. 128. (4.) The purpose of the notice was, that the creditor having the lien or incumbrance could have the opportunity of showing cause against the displacement of the lien or incumbrance, and its transfer from the property itself to the proceeds of its sale. It was only liens or incumbrances the security for a debt, with which the Bankrupt Court dealt; and, of consequence, it was notice to the creditor only which was essential to give validity to the proceedings.—*Ray v. Norsworthy*, *supra*; *Houston v. City Bank*, *supra*. (5.) A vendor, retaining the legal title as a security for the payment of the purchase-money, stands in the relation of a mortgagee.—*Bankhead v. Owen*, 60 Ala. 457. Upon the death of the vendor, the right to demand and receive the purchase-money devolves exclusively on his personal representative. Neither the heir, nor the devisee or legatee, can assert it at law; nor can either assert it in equity, unless peculiar circumstances may intervene.—2 Jones on Mortgages, §§ 1387–8. (6.) Notice of the application for the sale was given to the personal representative of Cain, the vendor, in the mode directed by the court. The jurisdiction of the court over the land—jurisdiction to fix and determine the *status*—was acquired by the notice and the prior proceedings. The lien upon the land was extinguished—it was transferred from the land to the proceeds of sale. The land itself was sold—the title and estate of the bankrupt, and the legal title which was the security for the payment of the purchase-money. Any other construction of the Bankrupt Law, or of the effect of sales made under decrees of the Court of Bankruptcy, would render sales by the assignee, of incumbered property, exceedingly insecure, and a fruitful source of litigation.

SOMERVILLE, J.—The suit is in ejectment, the plaintiffs claiming as the sole heirs of James W. Cain, who died in the year 1866. The legal title of the lands is shown to have been in Cain, who, as it appears, however, sold them during his lifetime to one Webster, executing to him a bond for title, and taking his notes for the unpaid purchase-money. Webster, having thus acquired the equitable title, went into possession of the premises, and in the year 1869 was adjudicated a bankrupt, under the provisions of the Bankrupt Act of 1867, then in force. The defendants claim title through a sale made by

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order of the Bankrupt Court, on application of the assignee of the bankrupt.

The plaintiffs are clearly entitled to recover, unless their legal title to the lands was divested by reason of the sale made by the assignee; for it is clearly settled, that the latter, as trustee of the bankrupt, took his property subject to all the legal and equitable claims of others, whatever they may have been.—*Cook v. Tullis*, 18 Wall. 332. The assignee, in other words, can take nothing more than the bankrupt himself had, except in cases where the latter has made a fraudulent conveyance of his property.—Bump on Bankruptcy, 10th ed., 490; *Bolling v. Munchus*, 59 Ala. 482; *Gayle v. Randall*, 71 Ala. 469.

It is admitted that the Bankrupt Court had full power to sell the property free of the lien existing for the purchase-money, which, in view of the vendor's retention of the legal title, is closely analogous to the lien of a mortgage. But it is insisted, that the title of the heirs was unaffected by these bankrupt proceedings, because they were not made parties, and had no legal notice of them. The contention, on the other hand, is, that notice to the personal representative of the decedent, Cain, was all that was requisite, as he was the holder of the lien; and the fact of such notice is undisputed. Where the owner of the legal title is also the holder of the lien, it is clear that, on a proper petition filed by the assignee, notice to the creditor thus secured would be sufficient to confer jurisdiction on the Bankrupt Court to sell so as to discharge the lien. This was said in *Ray v. Norseworthy*, 23 Wall. 128, where the incumbrance on the property was a mortgage, and notice to the mortgagee, if sufficient, was admitted to confer such jurisdiction. But we do not understand the rule to be, where property is sold in any manner, or for any purpose, by a Bankrupt Court, that the rights of persons who are not parties to the proceedings, and have such notice, can be affected to any extent by such sale. This principle was settled in the *Tenn. & Coosa Railroad Co. v. East Ala. Railway Co.*, 75 Ala. 516, and is otherwise well sustained by authority upon fundamental principles. In *Ray v. Norseworthy*, *supra*, it was said by Justice CLIFFORD, that there was no well considered case "which gives any support to the proposition, that the judgment, order, sentence, or decree of a court, disposing of property subject to conflicting claims, will affect the rights of any one not a party to the proceeding, and who was never in any way notified of the pendency of the proceedings."—Bump on Bankruptcy, 10th ed, pp. 619, 620. The judgments of Courts of Bankruptcy constitute no exception to the general rule, that persons who have never had their day in

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court can not be precluded of their property rights by such proceedings. This would not be "due process of law."

This principle is, in our opinion, conclusive of the case. Under the state of undisputed recitals in the bill of exceptions, the court erred in refusing to give the charge requested by the plaintiffs, which was, that the jury should find for them, if they believed the evidence.

Reversed and remanded.

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Bill in Equity by Ward, against Personal Representative of Deceased Surety on Guardian's Bond, for Account and Settlement.

1. *Guardian and ward; jurisdiction of equity to compel settlement.*—The Chancery Court has original jurisdiction over the settlement of guardian's accounts, and the ward may invoke its jurisdiction, at any time before proceedings have been commenced in the Probate Court, without assigning any special reasons.

2. *Parties to bill for settlement, when guardian is dead, and his estate insolvent.*—In the absence of statutory provisions, the death of the guardian, and the insolvency of his estate, furnish a sufficient reason for the omission to make his personal representative a party to a bill filed by the ward against the surety on his official bond, or the personal representative of the deceased surety, to compel an account and settlement; and the statute now authorizing a suit against one or more of several joint obligors without joining the others (Code, § 3754), such a bill may be maintained without alleging the insolvency of the estate of the deceased guardian.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. N. S. GRAHAM.

The bill in this case was filed on the 10th November, 1884, by John R. Fulgham, an infant, who sued by his next friend, against Mrs. Rosa Herstein, as the executrix of the last will and testament of her deceased husband, Robert Herstein; and sought to compel an account and settlement of the guardianship of the complainant by Leroy P. Walker, deceased, on whose official bond as guardian said Robert Herstein was surety. The bond, a copy of which was made an exhibit to the bill, was dated January 16th, 1874, and was conditioned that the said L. P. Walker "shall well and truly perform all the duties which are or may be by law required of him as such guardian." The bill alleged that said Walker received as guardian, on the 17th January, 1874, the sum of \$1,589.80,

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assets of his said ward's estate, and other assets subsequently amounting to \$2,500; that he made a partial settlement of his guardianship, in the Probate Court of said county (by which court his letters were granted), in November, 1877, when a balance of \$1,935.98 was ascertained and decreed to be in his hands, and another in December, 1879, when a balance of \$1,914.61 was ascertained to be in his hands; that said Walker in fact converted to his own use, while said bond was in full force, all the assets of the complainant's estate which had come into his hands; that he died in August, 1884, and his estate was insolvent; that said Robert Herstein also died in 1877, and his last will and testament had been duly admitted to probate, of which his widow was appointed executrix and sole devisee. On these facts, as alleged, the bill prayed a final settlement of the guardian's accounts, and a decree against the defendant for the balance ascertained to be due.

The chancellor sustained a demurrer to the bill, on the ground that the personal representative of the deceased guardian was a necessary party defendant; and his decree is now assigned as error.

R. C. BRICKELL, and D. D. SHELBY, for appellant, cited *Moore v. Armstrong*, 9 Porter, 697; *Watts v. Gayle*, 20 Ala. 817; *Frierson v. Travis*, 39 Ala. 150; Code, § 3754; *Teague v. Corbitt*, 57 Ala. 537; *Hailey v. Boyd*, 64 Ala. 399.

CABANISS & WARD, *contra*.—In a suit for the settlement of a trust, the trustee, or legal custodian of the assets of the trust estate, ought to be made a party, if within the jurisdiction of the court. A man may be a faithful trustee, and yet unable to pay his own debts. If the guardian were living, he would certainly be a necessary party to a bill to compel a settlement of his trust; and his insolvency would be no sufficient excuse for his omission. The presumption is, that he kept the assets of his ward's estate separate from his own, and in condition for his administrator to account for them; and the insolvency of his estate does not lessen the duty of his administrator to account for and surrender the assets which may come into his hands. The surety is entitled to demand this surrender, to lessen his own liability; and it can not be compelled, unless the administrator is a party to the suit. The statute relied on (Code, § 3754), it is submitted, is a legislative adoption of the 32d Order of the English Chancery Court, of August, 1841, which has been construed not to apply to cases in which an account of trust funds is to be taken.—1 Dan. Ch. Pl. & Pr., Cooper's ed., 267-9, note 7, and cases cited.

[Fulgham v. Herstein.]

CLOPTON, J.—The record presents the single question, whether the personal representative of a deceased guardian, whose estate is alleged to be insolvent, is a necessary party to a bill in equity brought by the ward against the executrix of the surety on the guardian's bond, for a settlement of the guardianship, and for the payment of whatever sum may be ascertained to be due.

Independent and exclusive of statute, the general rule is, that in cases of joint bonds or obligations, all the obligees and obligors must be made parties to the bill. "It has been said, that in regard to the obligors this is only a rule of convenience, and to save those who are severally charged the trouble of a new suit for contribution, against those who are not charged, and not a rule of necessity; and therefore it may be dispensed with in certain cases."—Story Eq. Pl., § 169. The general rule has its exceptions, founded on special grounds of convenience, or necessity. Among these exceptions is the insolvency of one of the obligors, whether principal or surety. The exception may be regarded as general as the rule.—*Madocx v. Jackson*, 3 Atk. 405; *Angerstein v. Clarke*, 3 Swanst. 147; *Montague v. Turpin*, 8 Gratt. 453; *Young v. Lyons*, 8 Gill, 162. Under our decisions, an allegation of the insolvency of joint obligors, not made parties, is a sufficient excuse for the omission to make them parties.—*Watts v. Gayle*, 20 Ala. 817.

The Chancery Court retains its original jurisdiction over the settlement of a guardian's accounts; and the ward may invoke the jurisdiction, when no proceedings have been commenced in the Probate Court, without assigning special reasons. In the absence of statutory authority, the Probate Court has no power to compel the personal representative of a deceased guardian to appear and settle his accounts.—*Snedicor v. Carnes*, 8 Ala. 655. The remedy, in such case, is in equity. A suit in equity against the sureties of a guardian is not auxiliary, but an independent, original suit. In order to maintain such suit, it is not necessary that the liability of the guardian should be antecedently ascertained, or that a prior demand should be made upon the guardian, or, if he be dead, upon his personal representative. In *Moore v. Armstrong*, 9 Por. 697, it was held, that when an administrator dies, leaving no property, or having no personal representative in this State, his sureties may be sued alone in equity, before a liability has been fixed upon their principal. And in *Frierson v. Travis*, 39 Ala. 150, which was a bill filed by a ward, against one of the sureties of his guardian, it is said: "It is shown that the guardian, being the principal obligor in the bond, was a non-resident of the State of Alabama, and died in the State of Texas, and that there was no administration upon his estate. With regard

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to the other surety not made a party, it appears that he died insolvent. These facts constitute a sufficient excuse, under our decisions, for the failure to make the representatives of the deceased obligors parties." The death of the guardian, and the insolvency of his estate, are alleged, the truth of which is admitted by the demurrer. A decree against his estate would not avail to the relief of defendant; and if the assistance of his personal representative is necessary in taking the account, and should not be voluntarily furnished, it can be compelled by appropriate proceedings.

Such is the rule, in the absence of statutory modification. The general rule has, however, been abrogated by statute. Every bond, by which two or more persons are jointly bound, is declared by statute to be several as well as joint.—Code, § 2905. Under the statutes, an action at law can be maintained separately against any one of several joint obligors. Section 3754 of the Code provides, in reference to proceedings in chancery: "When the plaintiff has a joint demand, he may proceed against one or more of the parties thereto, without joining the others." The purpose of the statute is to assimilate, in this respect, all bonds being joint and several, the practice at law and in equity. Under the statute, the complainant was authorized to bring his bill against the defendant as executrix of a surety, without making the personal representative of the deceased guardian a party, and without assigning any excuse for the omission.—*Teague v. Corbitt*, 57 Ala. 529.

Reversed and remanded.

Jones & De Pras v. Robinson.

Bill in Equity by Administratrix, for Settlement and Distribution of Estate under Voluntary Agreement, and to enforce Vendor's Lien on Land; Cross-Bill for Foreclosure of Mortgage.

1. *Vendor's lien; when mortgagee may claim protection against, as purchaser without notice.*—When the heirs and distributees of an intestate's estate voluntarily make an agreement among themselves for a division of the lands, each executing to the administratrix his note for the agreed value of the land allotted to him, to be paid and adjusted on final settlement of the estate, liens being retained and declared on each one's portion for his indebtedness; although the agreement is not recorded, the administratrix may enforce a vendor's lien against one portion of the

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land, as against a mortgagee of the heir to whom it was allotted, to the extent of the interest acquired by him under the agreement; but, as to the interest therein inherited by the mortgagor, the mortgagee may claim protection as a purchaser without notice, if he is also a purchaser for value.

2. *Same; when mortgagee is purchaser for value.*—A mortgage, when given only to secure an antecedent debt, does not entitle the mortgagee to protection in equity as a purchaser for valuable consideration; but, when given to secure a debt contemporaneously contracted, or in consideration of the extension of an antecedent debt, this makes a valuable consideration, and entitles the mortgagee to such protection.

3. *Answer as cross-bill between co-defendants.*—The answer of one defendant may be taken and considered as a cross-bill, as against the complainant in the original bill (Code, §§ 3801-02), but not as against another defendant, against whom it prays affirmative relief; yet, if the complainant answers it as a cross-bill, without objecting to the irregularity, all objection to it is thereby waived, and the irregularity is not available on error.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. N. S. GRAHAM.

The original bill in this case was filed on the 11th September, 1879, by Mrs. Caroline P. Robinson, as administratrix of the estate of her deceased husband, William Robinson, against the children and heirs of said decedent; and prayed a settlement of her administration, a distribution of the estate, a ratification of an agreement for the partition of the lands voluntarily executed by and between the several heirs, and the enforcement of a vendor's lien, in favor of the complainant, against a tract of land which, by the terms of the partition, was allotted to James P. Robinson, one of the children; and the general prayer, for other and further relief, was added. Winston Jones and J. A. DePras, surviving partners of the late mercantile partnership of J. W. Jones & Co., and John L. Rison, as trustee for their benefit, were also made defendants to the bill, on account of an interest which they asserted in the land, under a mortgage or deed of trust executed by said James P. Robinson subsequently to the agreement for partition.

William Robinson died, intestate, prior to July 21st, 1852, and letters of administration on his estate were on that day granted to John Robinson and James B. Robinson; and in December, 1858, they having made a final settlement of their administration, and resigned, letters of administration *de bonis non* were duly granted to the complainant in this case. The decedent left a large estate, consisting partly of lands, some of which were situated in Madison county, Alabama, and some in Noxubee county, Mississippi; and his five children were his heirs at law. The agreement for the partition of the lands, which was dated November 22d, 1869, signed by the widow and children (the husbands of the two daughters joining with their wives), and attested by two witnesses, recited that the parties,

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“with a view to final settlement and distribution of the estate of said William Robinson, have agreed, and do hereby agree as follows:” (1.) “That in lieu of dower in the real estate of said William Robinson, situated in Madison county, Alabama, the said Caroline P. Robinson, the widow, shall take and hold in fee simple” certain lands particularly described; and the other parties to the agreement “hereby release, remise, and forever quit-claim unto the said Caroline P., her heirs and assigns, all the right, title, claim and interest, in and to the real estate aforesaid, vested in them respectively as heirs at law of said William Robinson.” (2.) That as to the plantation in Mississippi, which the widow as administratrix had cultivated during the year 1866, the heirs elect to charge her with the crops raised. (3.) That a sale of the lands of the estate, made by the administratrix in October, 1869, “shall be set aside and annulled.” (4.) That Mrs. Mary K. Burritt, one of the heirs, the wife of A. R. Burritt, “shall take and receive the following lands,” describing them, “at and for the sum of \$5,415.” (5.) That Mrs. Fannie J. Ridley, the wife of Jas. L. Ridley, “shall take and receive the following lands,” describing them, “at and for the sum of \$15,226.13.” (6.) That James P. Robinson “shall take and receive, for himself, the following lands,” being the lands involved in this suit, which he afterwards mortgaged to J. W. Jones & Co., “at and for the sum of \$11,546.66.” (7.) That Charles T. Robinson “shall take and receive the following lands,” describing them, “at and for the sum of \$12,081.76. The lands hereinbefore mentioned are all situate in Madison county, Alabama; and the said parties hereby covenant and agree, that they will execute and deliver to each other all proper conveyances of the lands, herein and hereby agreed to be taken and received.” (8.) That the said Burritt and wife, Ridley and wife, James P. and Charles T. Robinson, “shall each execute to the said Caroline P. Robinson, as administratrix of said William Robinson, their several promissory notes for the respective sums at which it is agreed that they shall respectively take said land, and which notes shall be payable at twelve months. For the payment of the said notes said lands shall be bound, and a lien thereon is here now created—that is to say, the lands of each one are bound for the payment of the notes made by him or her. Said notes, however, are not to be paid until a final settlement of the estate of said William Robinson, and an equalization of the advances and accounts of each of said heirs shall have been made, and the application of whatever balance is due each heir shall have been applied to the payment of the note of each heir.” (The other stipulations of the agreement relate to the lands in Mississippi, and other matters having no connection with the subject of this suit.)

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As to the mortgage or deed of trust afterwards executed by said James P. Robinson, on the land allotted to him by the agreement for partition, to J. W. Jones & Co., or to John L. Rison as trustee for them, the bill contained these averments : " On March 28th, 1876, said James P. Robinson executed a deed of conveyance of the lands in Madison county so received and taken by him under said agreement, to John L. Rison, in trust, to secure an indebtedness of said James P. to Joel W. Jones & Co., of Mobile, a firm composed of Joel W. Jones, John A. DePras and Winston Jones, of whom said J. W. Jones has since died, to the amount of \$7,977.53 ; which said mortgage is on record in the proper office in said county of Madison, and there is no entry of record of the satisfaction thereof." The bill further alleged, also, that said James P. Robinson executed and delivered to the complainant, as administratrix, his promissory note for \$11,686, as *per* the provisions of the agreement for partition, of even date with the agreement, and payable twelve months after date, which was made an exhibit to the bill ; that the complainant had afterwards made a voluntary settlement with said Charles T. Robinson, Mrs. Burritt and Mrs. Ridley, executing mutual releases ; and that (*par.* 11), " crediting said distributees respectively with their shares of the several distributions made by " the administrators in chief, the administrator appointed in Mississippi, " and your oratrix, and the valuation of the lands of said estate, and charging them with the payments made to them in money, and the agreed valuation of the lands taken and received by them, with interest to January 1st, 1879, there will be due to your oratrix, from the defendant . . . James P. Robinson, \$7,043.93, with interest from January 1st, 1879 ; for the payment of which your oratrix claims a lien on the said lands in Madison county, Alabama, taken and received by him under said agreement of November 22d, 1869."

Jones and DePras, as surviving partners, filed a joint answer to the bill, in which they thus set up their mortgage : " It is true that, on the 28th March, 1876, said James P. Robinson executed a deed of conveyance to John L. Rison, in trust, to secure an indebtedness by him to Joel W. Jones & Co., a firm of which these defendants are the surviving partners, to the amount \$7,977.53 ; and the lands upon which said mortgage was taken are the same lands described in said alleged articles of agreement, as having been received by said James P. Robinson ; but these defendants aver that, at the time said mortgage was executed to their said firm, neither they, nor any member of their said firm, had any knowledge, information, belief or suspicion that said lands were incumbered by any charge or lien whatever ; and they deny that any lien or incumbrance

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existed on said land at the time, and aver that, if any such lien was attempted to be created as alleged in said bill, it can not affect their rights as *bona fide* mortgagees of said lands, without notice of any lien or incumbrance thereon. Said mortgage was duly recorded, as alleged, and no part of the debt thereby secured has ever been paid or satisfied. Defendants further allege that said mortgage, so executed to them by said James P. Robinson, constitutes a lien upon the lands thereby conveyed, paramount and superior to the lien claimed by complainants to have been created thereon; and defendants allege that said James P. Robinson is insolvent." They prayed that their answer might be taken and considered as a cross-bill; that their mortgage might be declared a first lien on the lands, and foreclosed by sale, and that they might have a personal decree against said James P. Robinson for the residue of their debt.

An answer to the cross-bill, thus filed, was filed by Mrs. Robinson, the administratrix, and the several children and heirs, jointly, in which, admitting the execution of the mortgage or deed of trust to Rison, they averred that "said indebtedness therein recited was pre-existing, and was not contracted at the time of the execution of said deed, nor in consideration or expectation of the execution of said deed, and said indebtedness has been fully paid and discharged;" also, "that the only interest said James P. Robinson ever had, in or to said lands, is a legal title to an undivided one-fifth by descent from said William Robinson, and an equitable title to the whole under and by virtue of said agreement of November 22d, 1869."

On final hearing, on pleadings and proof, the chancellor held that the complainant, as administratrix, was entitled to a prior lien on the lands, for the full amount due on James P. Robinson's note, with interest, citing *Bankhead v. Owen*, 60 Ala. 467; and the amount due on both of the debts having been ascertained by the register under a reference, and the report confirmed without objection, he ordered the lands to be sold by the register, and the proceeds of sale to be appropriated to the payment of the amount due to the complainant; the balance, if any, to be retained and appropriated as a payment on the debt due to said Jones and DePras: and the costs were adjudged against said James P. Robinson, Jones, and DePras.

From this decree Jones and DePras appeal, and here assign as error the decree giving complainant a prior lien on the lands, the dismissal of their cross-bill, and the decree imposing the costs on them.

HUMES, GORDON & SHEFFEY, for appellants.—(1.) One of the notes secured by the appellants' mortgage was given for advances then made and to be made, and the other was given for

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an existing debt which was extended. As to both of said debts, then, they occupy the position of purchasers for valuable consideration, and are entitled to protection against an equitable claim or lien of which they had no notice.—*Thurman v. Stoddard*, 63 Ala. 336; *Thames v. Rembert*, 63 Ala. 561; *Cook v. Parham*, 63 Ala. 456; *Whelan v. McCreary*, 64 Ala. 320; *Life Insurance Co. v. Randall*, 71 Ala. 220. (2.) At the time this mortgage was executed, James P. Robinson was in undisputed possession of the land, claiming the entire and absolute interest; having inherited an undivided one-fifth interest, and acquired the remaining four-fifths under the agreement for partition, which had never been recorded, and of which appellants had no knowledge, notice, or suspicion. As against their mortgage, procured by his representations as to his estate and title, a claim under the unrecorded agreement can not prevail.—*Burns v. Taylor*, 23 Ala. 255; *Stone v. Britton*, 22 Ala. 543; *Blakeslee v. Life Insurance Co.*, 57 Ala. 206; *David v. Shepard*, 40 Ala. 587; *Guthrie v. Quinn*, 43 Ala. 561; *Pool v. Harrison*, 18 Ala. 514; *Hendricks v. Kelly*, 64 Ala. 388; *Hurdson v. George*, 56 Ala. 295; *Jones v. Reese*, 65 Ala. 134; *Turner v. Flinn*, 72 Ala. 532.

CABANISS & WARD, *contra*. — (1.) As against the legal title, a plea of *bona fide* purchase for value is not available. Although James P. Robinson inherited an undivided one-fifth interest in the lands, he only held an equitable title to the remaining four-fifths under the agreement for a partition; and the appellants are charged with notice of this agreement, though they deny notice, and require proof of the execution of the agreement. (2.) Without a sale of the lands under the agreement, James B. Robinson's interest as an heir would have been subject to his indebtedness to the estate on account of what he had received of the personal property in excess of his distributive share.—*Goodman v. Benham*, 16 Ala. 625. (3.) The mortgage was given to secure an indebtedness, the greater part of which was pre-existing, only a small part being then contracted; and this does not constitute the mortgagees purchasers for value. When debts of different grades are thus mingled, that of the lowest grade determines the character of the whole; else a small present payment or consideration would make a mortgage for antecedent debts of any amount a purchase for value. (4.) An answer can not be taken as a cross-bill, as between co-defendants.—Code, § 3801.

STONE, C. J.—So far as Mrs. Robinson's bill seeks to sell, in payment of the purchase-money, that interest in the land which James P. Robinson purchased under the agreement of

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November 22d, 1869, her equity is superior to that of Jones & DePras. The title was retained in the vendors, as security for the purchase-money; and as to this interest, the plea of purchaser without notice is unavailing.—*Bankhead v. Owen*, 60 Ala. 457, and authorities cited. This includes an undivided four-fifths interest in the lands, to which James P. Robinson has never had any title. If J. W. Jones & Co. had no notice of the defect in Robinson's title, when they accepted his mortgage, it was their own fault. If they had looked into the chain of title, they would have found no evidence that it was in James P. Robinson.

When William Robinson died, owning the lands in controversy, the title descended to his heirs, five in number. James P. Robinson was one of the five, and, by his father's death, the title to one undivided fifth of the lands vested in him *eo instanti*. Any proper investigation of the title would have led to this discovery. That interest being already in him, he did not purchase it when he purchased the remaining four-fifths. As to that interest, Mrs. Robinson can assert no vendor's lien. *Norman v. Harrington*, 62 Ala. 107. If she has any lien on that fifth interest, it is by virtue of the agreement of November 22, 1869. That was a private agreement between the parties interested in Robinson's estate, of which J. W. Jones & Co. are not shown to have had any notice, actual or constructive. It follows that that firm, if they stand in the attitude of purchasers, acquired by their mortgage a lien on this undivided fifth interest, which is paramount to that of Mrs. Robinson. *Wells v. Norman*, 35 Ala. 125; *Chandler v. Tardy*, 58 Ala. 150.

The indebtedness of James P. Robinson to Joel W. Jones & Co. is evidenced by two notes; one for fifteen hundred and twenty-five dollars, dated March 2, 1876, and due November 20th, 1876. This was for supplies advanced, and agreed to be advanced during that year. The other was for over six thousand dollars, dated March 13, 1876, and due December 1, 1876. The mortgage bears date March 28, 1876. All these dates, it will be observed, are different. It is, however, averred and proved, that Joel W. Jones & Co. agreed to make to Robinson advances for that year, and, taking his note therefor, it was agreed that the said mortgage should be afterwards made to secure its payment. The larger note was but a renewal of an antecedent debt. As to this, however, it is shown that it was agreed to be extended until the December afterwards, on the like agreement, that its payment should be secured by the said mortgage. This, when the mortgage was given pursuant to agreement, constituted them purchasers as to both notes.—*Sweeney v. Bieler*, 69 Ala. 539; *M. & C. P.*

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R. R. Co. v. Talman, 15 Ala. 472; *Kirksey v. Means*, 42 Ala. 426.

It is contended for appellee, Mrs. Robinson, that James P. Robinson had received of the personal assets of the estate largely more than his share; and that she, the administratrix, has a right to be reimbursed out of this fifth interest in the land, for such over-payment.—*Goodman v. Benham*, 16 Ala. 625; *Brown v. Lang*, 14 Ala. 719. It is a sufficient answer to this, that the pleadings do not raise the question; and if it were raised, we find no facts in the record to call for its application. James P. Robinson's deficiency is not for over-advancements, or rather over-payments made to him as a distributee. It is for the unpaid balance of the large purchase of lands, made by him in the family agreement of November 22, 1869.

It is further contended for appellee, that inasmuch as Jones & De Pras filed no separate cross-bill, but simply converted their answer into a cross-bill; and inasmuch as they pray relief against their co-defendant, James P. Robinson, they can obtain no relief under such pleading. If proper objection had been taken at the proper time, or if Mrs. Robinson had not waived the irregularity by pleading to it, or answering it as a cross-bill, this objection would be well taken. We hold, however, that by answering it, without objecting to it in the court below, all objection to the form of its presentation must be considered as waived.—*Davis v. Cook*, 65 Ala. 617; *Gilman v. N. O. & S. R. R. Co.*, 72 Ala. 566.

The decree of the chancellor must be reversed, and a decree here rendered in accordance with the principles declared above. It is therefore ordered and decreed that, of the proceeds of the land when sold, four-fifths will be paid to Mrs. Caroline P. Robinson, administratrix, until her entire claim is paid, and one-fifth to Jones & De Pras, surviving partners of Joel W. Jones & Co. Should there be a surplus left after paying Mrs. C. P. Robinson in full out of the four-fifths, that, too, will be paid to Jones & De Pras, after reimbursing to Mrs. Robinson any costs she may have to pay on proceedings in the court below, but not to include any costs of appeal.

Let the costs of the original and cross suits, incurred in the court below, be paid, one third by Jones & De Pras, and two thirds by James P. Robinson. If not paid by him, then by Caroline P. Robinson.

Reversed and rendered.

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Berry v. Webb.

Bill in Equity for Reformation of Conveyance, and Partition.

1. *Reformation of conveyance, and partition of lands ; jurisdiction of equity.*—A court of equity has undoubted jurisdiction to reform a conveyance of lands, by correcting a mistake in the description of the premises, when established by clear and satisfactory evidence ; and to decree partition of lands between two tenants in common, although the defendant has been in possession, holding adversely, for any period less than ten years.

2. *Partition ; legal and equitable titles.*—A court of equity may decree a partition of lands, whether the title of the parties be legal or equitable ; and while the practice generally is to refer the decision of a disputed legal title to the jury, the whole question is for the decision of the court when an equitable title is involved.

3. *Voluntary partition by parol.*—Whether a partition of lands by parol agreement, followed by possession taken and held, pursuant to its terms, for a period less than ten years, will bar a bill in equity for partition, is not decided.

4. *Partition refused, on account of insufficient proof of title.*—Where the complainant asserted title under a conveyance of the land to him and his sister by their father, as an advancement, and asked a reformation of the deed by correcting an alleged mistake in the description of the land intended to be conveyed ; and the evidence showed that, by subsequent agreement between him and his father, another tract was conveyed to him in lieu of his interest in the first, and that possession was taken and held, pursuant to this arrangement, until after the death of the father, when complainant had the first deed recorded, and then filed his bill asking a reformation and partition ; *held*, that the bill was properly dismissed on the evidence.

APPEAL from the Chancery Court of Jackson.

Heard before the Hon. N. S. GRAHAM.

The bill in this case was filed on the 8th November, 1882, by William M. Berry, against Mrs. Elizabeth Webb, who was his sister, and the other children and heirs at law of his deceased father, John Berry ; and sought the reformation of a deed, by which said John Berry conveyed a tract of land to the complainant and his said sister, by correcting an alleged mistake in the description of the lands intended to be conveyed, and a partition of the lands between them. The deed, a copy of which was made an exhibit to the bill, was dated the 17th February, 1872, but was not recorded until the 16th February, 1881 ; and it recited as its consideration the present payment of \$600 by each of the grantees. The chancellor overruled a demurrer to the bill, but, on final hearing on pleadings and proof, dismissed it ; and his decree is now assigned as error.

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R. C. HUNT, JNO. D. BRANDON, and LAWRENCE COOPER, for the appellant, cited *Yarborough v. Avant*, 66 Ala. 526; and *McMath v. DeBardelaben*, 75 Ala. 68.

ROBINSON & BROWN, *contra*.

SOMERVILLE, J.—The present bill is filed for the purpose of correcting an alleged misdescription of certain lands conveyed by one John Berry, in the year 1872, to the appellant, William Berry, and Elizabeth Webb, then Elizabeth Heatherington; and for the further purpose of having a partition of these lands decreed as between appellant, who was complainant in the lower court, and said Elizabeth Webb—the two grantees in the conveyance thus being averred to be tenants in common.

We entertain no doubt of the jurisdiction of the court to grant the relief prayed, notwithstanding the fact that the complainant is shown to have been out of possession for many years prior to the filing of the bill, and the defendant, Mrs. Webb, in possession holding adversely for a period of time less than ten years, so that her title had not become perfect under the influence of the statute of limitations. The correction of mistakes of description in written instruments, established by clear and satisfactory proof, so as to make them conform to the true intention of the contracting parties, is a common ground of equity jurisdiction.—*Berry v. Sowell*, 72 Ala. 14; *Alexander v. Caldwell*, 55 Ala. 517; 1 Story's Eq. Jur. §§ 165–166. So, likewise, is the partition of property owned by joint tenants, or tenants in common.—*Deloney v. Walker*, 9 Port. 497. This jurisdiction to decree partition exists, whether the title is legal or equitable. When purely legal, the practice is, often, to refer the determination of disputed titles to a jury, to be tried as an issue of fact.—Code, 1876, § 3893; *McMath v. DeBardelaben*, 75 Ala. 68. But, where the title is equitable, the whole question is for the decision of the chancellor, without the intervention of a court of law; equitable titles being peculiarly within the cognizance of courts of equity, and receiving no recognition in courts of law.—Willard's Eq. Jur. 704. It is observed in Adams' Equity (7th Amer. Ed.), 230*, note 1: "In cases of equitable estates, or defenses, chancery has, of necessity, jurisdiction over the whole matter."—Freeman on Co-tenancy & Part. § 439; *Coxe v. Smith*, 4 John. Ch. 276. This principle is clearly announced and fully recognized in *McMath v. DeBardelaben*, *supra*.

The defenses interposed to the bill resolve themselves into two. The first is, that the complainant had consented to a verbal partition of the lands, and that each party had occupied

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their particular part of the premises in severalty, for many years; and that the division thus made, having been acted on by the parties, ought to be regarded as fair and equal by the court, so as not to be disturbed. The second is, that the complainant had failed to show that he had any title to the lands in question, which could receive recognition in a court of equity. The chancellor sustained the first defense, and, intimating a doubt as to the sufficiency of the evidence as to title, dismissed the bill. We do not decide, at this time, that a parol partition of lands between two co-tenants, followed by less than ten years possession in conformity to it, will be sufficient to bar such a bill, or justify its dismissal.— *Yarborough v. Avant*, 66 Ala. 526; Browne on Stat. Fr. §§ 72, 75; Code, 1876, § 2121. But we are of opinion, that the decree dismissing the bill can be sustained upon the second ground of defense. We are inclined to believe, from the evidence, that the complainant had no title, having exchanged his undivided interest in these lands for the tract conveyed to him by his father, John Berry, in April of the year 1876. It is admitted, that complainant never owned anything but an equity to half of the lands in controversy, the legal title being retained in the father, by mistake, when he executed the deed of February, 1872. This property was conveyed to him as an advancement, valued at six hundred dollars, at the same time that similar advancements, valued at a like sum, were made to Mrs. Webb, and other children of the grantor. When John Berry conveyed the second tract to complainant, in 1876—which is also recited to be an advancement valued at six hundred dollars—he (the said Berry) went into immediate possession of the tract in controversy, collecting the rents, and claiming ownership of the complainant's undivided half of it; and simultaneously the complainant himself took possession of the other tract conveyed by the deed. The grantor, about the same time, made a second deed to Mrs. Webb, conveying to her individually the same interest in these lands which was intended to be conveyed to her and complainant jointly by the deed of 1872. There is evidence strongly tending to prove that the complainant agreed to surrender the latter deed, which was in his possession; and this is corroborated by the suspicious fact, that he withheld it from the record until the death of his father, the grantor, which occurred in the year 1881, when he precipitately had it recorded. The whole transaction thus presents every evidence of an intended exchange of lands. There are, moreover, many admissions proved to have been made by complainant, to various persons, at different times, to the effect that he and his father had exchanged lands; and like declarations of the father are shown, in his presence. It is true that there are, also, ad-

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missions of the father that the exchange was only of the rents; and the complainant testifies to this as a fact. A careful examination of the testimony satisfies us, that all the facts of the case better harmonize with the theory, that the parties intended an exchange of the titles of the lands, and not a mere retention of rents during the life of John Berry, as is contended. The testimony does not support the view, that the deceased intended a double portion by way of advancement of his estate to the complainant; his declarations to that effect being made in extreme old age, and when he was surrounded by influences which tended to lessen their weight as credible expressions of intention. We are of opinion that the complainant has made a contract to part with his equitable title to the lands in controversy, for which he has received full consideration; and the contract of sale being accompanied by an exchange of possessions, clearly referable to it, he has no title which will justify the relief sought by the bill.

The decree of the chancellor dismissing the bill is affirmed.

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Contest of Claim filed against Insolvent Estate.

1. *Pending suit, as claim against insolvent estate; time of filing, and objections to.*—The mere pendency of an action against the administrator, at the time an estate is declared insolvent, does not take away the jurisdiction of the Probate Court to adjudicate the claim, nor extend the time for filing objections to it. The plaintiff may, notwithstanding the suggestion of insolvency, proceed to trial on the other issues, and have his judgment certified to the Probate Court; but he is not required to do so, and may at once file his claim in the Probate Court, afterwards dismissing his suit; and no objections being filed within the period allowed by the statute (Code, § 2375), the claim must be allowed.

APPEAL from the Probate Court of Colbert.

Tried before the Hon. JOHN A. STEELE.

In the matter of the insolvent estate of F. C. Vinson, deceased, of which R. B. Lindsay was the administrator, and against which a claim was filed by W. Cunningham, as the administrator of the estate of Hugh C. Leekey, deceased, which claim was contested, in the name of the administrator, by the distributees of the estate. The estate of said Vinson was reported insolvent by said administrator on the 10th August, 1882, and was declared insolvent by the court on the 11th September, 1882. The claim of said Cunningham, as admin-

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istrator of Leckey, which was filed, duly verified by affidavit, on the 10th April, 1883, consisted of a promissory note for \$594.45, executed by said Vinson, dated April 15th, 1874, and payable one day after date to said Cunningham as administrator. An action at law on this note was instituted by said Cunningham, as administrator, on the 19th April, 1882; and that action was pending when the estate was reported and declared insolvent. The defendant in the action, who was said R. B. Lindsay, pleaded the statute of non-claim, the statute of limitations, payment and set-off; and afterwards filed a special plea, setting up the declaration of insolvency. On the 17th March, 1884, the plaintiff took a non-suit, and a judgment was so entered in due form. No objections to the allowance of the claim were filed in the Probate Court until the 11th July, 1884. The ground of the objections then filed was, that the claim was barred by the statute of limitations of six years; and the pendency of the action in the Circuit Court, with the proceedings and judgment therein, was set up as a reason why the objections were not filed at an earlier day. The plaintiff moved to strike the objections from the file, because they were not filed within nine months after the declaration of insolvency; and he reserved an exception to the overruling of his motion. The plaintiff then took issue on said objections, "which were filed, by agreement, by way of pleas," and introduced as evidence his claim as filed, with the affidavit verifying it, and the declaration of insolvency; and the contestants offered in evidence a transcript from the records of the Circuit Court, showing the proceedings and judgment in the action at law, as above stated. The plaintiff objected to the admission of this transcript as evidence, on the ground of irrelevancy, and duly excepted to the overruling of his objection. On this evidence, the court held that the pendency of the action at law, and the pleas filed in defense of the action, "obviated the necessity of filing objections to the claim in the Probate Court;" and further holding that the objections were filed within proper time, and were well taken, rendered a judgment disallowing and rejecting the plaintiff's claim. The plaintiff duly excepted to this ruling and judgment, and he now assigns the same as error, together with the other rulings above stated.

JAS. JACKSON, W. L. BRAGG, and D. D. SHELBY, for the appellant.

WATTS & SON, and J. C. KUMPE, *contra*.

CLOPTON, J.—Under the statutes prior to the act of 1843, the effect of the insolvency of an estate, judicially ascertained,

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was to transfer to the Orphans' Court the exclusive jurisdiction of all claims against the estate, and to abate all suits on such claims against the personal representatives, pending at the time of the declaration of insolvency.—*Edwards v. Gibbs*, 11 Ala. 292. By the twelfth section of the act of 1843, which has been condensed and incorporated in the subsequent Codes, and is contained substantially in sections 2579 to 2581, inclusive, of the Code of 1876, a pending suit does not abate, but the personal representative may plead specially that the estate has been declared insolvent; and in such case, the other issues must be tried, and a judgment rendered thereon. If such judgment is for the plaintiff, no execution must issue, if it is shown to the court that the estate has been declared insolvent; but an order must be made, that the judgment be certified to the proper Probate Court; and, on a certified copy being filed, the same must be allowed as a claim against the estate, unless it is shown to have been obtained by collusion.

It is insisted, that the effect of the present statutes is, to *require* the Circuit Court, when the suit is there pending, to retain jurisdiction, try the issues, and adjudicate the justness and validity of the claim; and that they debar the plaintiff from dismissing his suit, and transferring the claim to the jurisdiction of the Probate Court for adjudication; in other words, that they exclude the jurisdiction of the Probate Court, of claims the subject-matter of pending suits in the Circuit Court. The vice of the proposition lies in a misconception of the purpose and scope of the act of 1843. With a view to secure speedy and inexpensive settlements of insolvent estates, exclusive jurisdiction of all claims was, by previous statutes, vested in the Probate Court. Under the operation of the statutes, suits that had been properly commenced in the Circuit Court, when the estate was supposed to be solvent, were abated, and the plaintiffs, after having incurred considerable costs and expense, were transmitted to another forum, and another suit, for the adjudication of their claims. The act of 1843 was designed to remedy this mischief; and the remedy proposed was, to restore to the Circuit Court its original right to retain jurisdiction, try the issues, and render judgment, notwithstanding the decree of insolvency. The effect is, not to take from the Probate Court *all* jurisdiction of claims, on which suits are pending, but the *exclusive* jurisdiction.

The statute requires, *in terms*: "Every person, having any claim against the estate declared insolvent, must file the same in the office of the judge of probate, within nine months after such declaration, or after the same accrues." As the result of judicial decision, construing the statutes *in pari materia*, an exception has been allowed in favor of claims, the subject of

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pending suits.—*Thames v. Herbert*, 61 Ala. 340. The exception does not go to the extent of dispensing, under any and all circumstances, with the statutory requirement, nor does it postpone the time in which claims are required to be filed, except in the event the validity and the amount of the claim are judicially ascertained. A pending suit, without prosecution to judgment, does not bring the claim within the exception. *Pipkin v. Hewlett*, 17 Ala. 291. A dismissal of the suit withdraws the claim from the benefit of the exception, and a failure to file it within the statutory time will operate a perpetual bar. The declaration of insolvency does not affect the pending suit, further than a special plea may be interposed, and to prevent the issue of execution; a different mode of obtaining payment of the judgment being provided. The suit progresses in all other respects, and with the same rights secured to the parties, as if the estate were solvent. The plaintiff has the right to dismiss the suit, and the statute does not require the Circuit Court to retain it, against the plaintiff's right of dismissal. Exclusive jurisdiction of all claims having been previously conferred on the Probate Court, and the *exclusive* jurisdiction, as to a certain class of claims, having been taken away by a subsequent statute, without prohibiting all jurisdiction, the operation of the statutes is, to confer on the Probate Court exclusive jurisdiction of all claims on which suits are not pending, and concurrent jurisdiction of claims the subject of pending suits in other tribunals; and the rules are applicable which govern in cases of courts of concurrent jurisdiction.

In *McDougald v. Rutherford*, 30 Ala. 253, it was held, that where a claim was filed in the Probate Court against an insolvent estate, within the requisite time, and, on written objections being filed within the prescribed period, an issue was made up and tried, the parties appearing, a judgment disallowing the claim is conclusive on the plaintiff, though a suit upon the claim was pending in the Circuit Court, at the time of the decree of insolvency. It is said: "The Circuit Court having first obtained jurisdiction of the cause, the plaintiff, by interposing in a proper manner the pendency of suit in that court, might have defeated the proceedings to test his claim in the Probate Court. But the Probate Court unquestionably had jurisdiction of the subject-matter. The plaintiff had the right to file his claim in that court, and prosecute it to judgment, if he could."

The general policy of the law is, that all claims, entitled or claiming to share in the distribution of the estate, shall, at the expiration of nine months after the declaration of insolvency, appear on the docket of the Probate Court, subject to the inspection of the administrator and creditors. There are statu-

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tory exceptions, in favor of infants and persons of unsound mind, and of claims which have not accrued. A construction of the statutes, which contravenes this general policy, is not warranted. The appellant had the indisputable right to file his claim in the Probate Court, though suit thereon was pending in the Circuit Court; and the effect of such filing was to give the Probate Court jurisdiction of the claim. Thereupon, the appellant had the right to obtain, in that court, the allowance of his claim, unless prevented by proper interposition. It may be, that the administrator, or any creditor or distributee, the appellant having filed his claim in the Probate Court during the pendency of his suit in the Circuit Court, might have defeated the trial of the same in the Probate Court, unless and until the suit in the Circuit Court was dismissed, by filing in a proper manner written objections to further proceedings on account of the pendency of suit in that court. If it be conceded that the proceedings in the Probate Court could have been stayed, the effect of such an interposition would not have been an abatement of the filing of the claim, as in case of a plea of the pendency of a former suit on the same cause of action. Such effect would be to indirectly defeat the claimant's right to file his claim, which is independent of, and unaffected by a pending suit in the Circuit Court. If the appellant had proceeded to try the issues in the Circuit Court, and judgment had been rendered, it would have been conclusive on the parties in the Probate Court; but, as, in the exercise of a legal right, he dismissed his suit in the Circuit Court, his claim was on the same footing, and in the same condition as other filed claims; and if no objections are filed within twelve months after the declaration of insolvency, directed to the merits of the claim, its allowance is a right secured to the claimant by the statute, unless facts subsequently occur, which bar the demand, or defeat the claimant's right to share in the distribution of the estate.—*Thames v. Herbert, supra*; *Clark v. Knox*, 70 Ala. 607; *Eubanks v. Clark*, at present term. The dismissal of the suit in the Circuit Court, after the expiration of the time for filing objections, does not bar the claim.

The statute, in express terms, requires written objections to any claim filed against the estate to be filed within twelve months after the declaration of insolvency. To extend the time, in case of a pending suit in the Circuit Court, to twelve months after the dismissal of the suit, would be judicial legislation. The statute does not limit the necessity of filing objections within the twelve months to claims *required* to be filed. Its terms are, "may object to the allowance of any claim *filed* against the estate." The claim of the appellant was filed in the Probate Court, within nine months after the decree of insol-

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veney; and the administrator, or any creditor or distributee, had three months thereafter in which to file objections. The right of the appellant to dismiss his suit in the Circuit Court, and the contingency of its dismissal, required, as a cautionary measure, objections to be filed in the Probate Court, within the twelve months, so as to try the issues in the forum of the claimant's election.

We do not construe the statement in the record, that the objections were "filed by agreement by way of pleas," as a waiver of the time within which the objections should have been filed. The objections had been previously filed, and a motion to strike them out, because not filed in time, was made and overruled. To obviate the necessity of preparing regular pleas to the complaint filed by appellant, the agreement was to consider the objections filed as pleas. Such seems to have been the understanding of the parties, and of the probate judge, as the point was not made in the Probate Court.

Reversed and remanded.

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Bill in Equity for Redemption, by Judgment Creditors.

1. *Decree in chancery for sale of lands, "subject to mortgages."*—In a suit by judgment creditors of the husband, seeking to set aside as fraudulent a conveyance of lands to the wife, and to subject the land by sale to the satisfaction of their judgments; subsequent mortgagees of the husband and wife having intervened, asserting their rights, and claiming protection as purchasers for valuable consideration without notice; *held*, that a decree in favor of the complainants, ordering the lands to be sold "subject to the said mortgages," was a recognition and determination of the validity of the mortgages, and estopped the complainants from assailing their validity, in a subsequent suit seeking to redeem from the purchasers at the sale under the decree, who afterwards succeeded by purchase to the rights of the mortgagees.

2. *Redemption of real estate; what are "lawful charges;" sale under power in mortgage.*—If, in such case, the mortgages had not been foreclosed, at the time the decree ordering the sale was rendered, by a sale under the powers therein contained, their validity being thus recognized by the decree, they constituted a "lawful charge" on the property, which the judgment creditors, seeking to redeem, were required to pay or tender; and if they had been thus foreclosed, whereby the equity of redemption was cut off, and only a statutory right of redemption remained in the mortgagor, the purchasers at the sale under the decree acquired nothing which could be redeemed by a judgment creditor.

3. *Bill for redemption under mortgage; who may file.*—No person can come into a court of equity for a redemption of a mortgage, but one who is entitled to the legal estate of the mortgagor, or claims a subsisting in-

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terest under him; and where the husband, as trustee, joins with his wife in a mortgage of her lands, an assignee or purchaser from him can not maintain a bill to redeem.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. N. S. GRAHAM.

The bill in this case was filed on the 31st January, 1884, by W. M. Holden and others, as judgment creditors of Joseph C. Bradley, against the partners composing the firm of William R. Rison & Co., a partnership doing business in Huntsville; and sought to redeem a tract of land, which the defendants had purchased at a sale made by the register in chancery, on the 5th November, 1883, under a decree rendered by the Chancery Court, in a suit therein then pending, wherein these complainants and others were plaintiffs, and said J. C. Bradley and wife, with others, were defendants. The chancellor dismissed the bill, on demurrer, on the ground that its allegations, with the exhibits, showed that the defendants held under Mrs. Isabella Bradley, the wife of said Joseph C. Bradley, and that he had no such interest in the land as authorized his judgment creditors to redeem. The complainants appeal, and assign this decree as error. The opinion states the material facts.

WATTS & SON, JNO. D. BRANDON, and D. D. SHELBY, for appellants.

HUMES, GORDON & SHEFFEY, and F. P. WARD, *contra*.

SOMERVILLE, J.—The bill is filed by certain judgment creditors of Joseph C. Bradley, to redeem a tract of land, or the interest of said Bradley therein, which had been sold under a decree of the Chancery Court, within less than two years before the filing of the bill. The legal title of this land had been vested in Mrs. Bradley, the wife of the debtor, by purchase at a Register's sale. Upon a bill filed by the appellants, and also upon similar bills filed by other creditors of Joseph C. Bradley, this purchase was adjudged to be fraudulent, and the land was condemned to be sold as Bradley's property; and it was sold in accordance with the decree of the Chancery Court. It was purchased by the defendants, William R. Rison & Co., *subject, however, to two mortgages*, executed by Bradley and wife to Fordyce & Rison; one of which was executed in July, 1872, and the other in April, 1874. The main difficulties of this case arise from the questions touching the title acquired under these mortgages, to which the defendants, Rison & Co., have succeeded by purchase from the mortgagees.

The complainants, in their offer to redeem, recognize the

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validity of the mortgage of April, 1874, which was executed after Mrs. Bradley was relieved of her disabilities of coverture, by special legislative enactment, so as to authorize her to make such a conveyance. They offer, therefore, to pay the amount of this incumbrance, as a "lawful charge" upon the property, within the meaning of our statutes relating to the subject of redemption. But they impugn the legal liability of the mortgage of July, 1872, upon the ground that it was a mortgage executed by a married woman, upon her statutory separate estate, while laboring under the disabilities of coverture. They insist that, for this reason, it was void; and no offer is made in the bill to pay it. The tender for redemption, in other particulars, is conceded to conform to the requirements of the statute.—Code, 1876, §§ 2877 *et seq.*

There are many forcible reasons in support of the view taken by appellee's counsel, that, in a case like the present, where real estate has been subjected to sale as the property of a fraudulent grantor, the right to redeem the property belongs to the grantee, and to his judgment creditors, rather than to the grantor and like creditors of his. But we do not propose to enter upon the discussion of this point, or to intimate any opinion in reference to it, as the case can, in our view, be better decided upon other grounds. It is sufficient to consider the title acquired by defendants under the two mortgages executed by Bradley and wife, to which we have above adverted.

These mortgages, in our opinion, are to be taken as conclusively binding on the appellants, by reason of the decree of the Chancery Court rendered in September, 1880, which was afterwards affirmed on appeal to this court. They were parties to the cause, their purpose being to subject to sale the interest which Joseph C. Bradley had in these lands, if any. The mortgagees, Fordyce & Rison, were also parties to this suit, having intervened for the sole purpose of asserting and protecting the title acquired under these conveyances. The pleadings show that the validity of these mortgages was one of the questions fairly coming within the issues to be tried by the chancellor; and that it was not only necessarily involved in the matter adjudicated, which would be sufficient without more, but that it was actually decided, if we do not too narrowly construe the language of the chancellor's decree. This decree adjudges, that the land in controversy "be sold *subject to two mortgages* executed by said Bradley and wife, one on the third day of July, 1872, and the other on the fourteenth day of April, 1874, to secure debts therein described, to Fordyce & Rison." In that cause, it was competent for the appellants to assail the validity of these mortgages as legal incumbrances upon the land, on any ground they desired. This right they

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waived, and the court pronounced them to be valid, by declaring that the property prayed to be sold should be sold "subject" to them—which must be construed to mean, subject to the title conveyed by them as valid and binding conveyances. The appellants having failed to successfully assail this decree by appeal, they can not now do so collaterally in another suit. The case presents a clear instance of estoppel by judgment, being *res adjudicata*.—*McDonald v. Mobile Life Ins. Co.*, 65 Ala. 358.

The validity of the mortgages being assumed, it does not affect the result of this case, whether they had been foreclosed under power of sale, when the decree of September, 1880, was rendered, or not. If no foreclosure had taken place, they constituted such incumbrances upon the premises as to come within the signification of "lawful charges," as this phrase is used in the statute.—Code, 1876, §§ 2879, 2881. In construing this statute, in *Grigg v. Banks*, 59 Ala. 311-317, the following language was used: "The word *charge* is of very large signification, and in the statute its proper signification is, every lien, or incumbrance, or claim the purchaser may have upon the premises, and for which, at law or in equity, he would be entitled to hold the lands as security, or to the satisfaction of which a court of equity would condemn them." *Parmer v. Parmer*, 74 Ala. 285; *Cramer v. Watson*, 73 Ala. 127. We need not decide that an incumbrance, put upon lands by a stranger or outsider, is, or can be regarded, as a lawful charge within the meaning of this statute. This is not a case of that kind. The mortgage in question, it is true, is primarily the act of Mrs. Bradley; yet it is executed by the consent of her husband, the judgment debtor, who unites with her in making it—whether strictly as a grantor, or for the purpose of giving legal validity to the instrument by evincing his written consent, it does not seem to us to be material. Mr. Bradley was privy to its execution, and the Chancery Court has by its decree, to which the appellants were parties, declared it a lawful incumbrance upon the premises, to the satisfaction of which these lands could be condemned. The mortgagees were purchasers from a fraudulent vendee, but they were *bona fide* purchasers, without notice of the fraud; and it was only on this principle that the validity of their mortgages could have been sustained.—*Allen v. Maury & Co.*, 66 Ala. 10; *Thames v. Rembert*, 63 Ala. 561.

If it be insisted that the mortgagees had foreclosed their two mortgages, at the time of the rendition of the decree of the Chancery Court in September, 1880, the legal effect of the transaction is not varied, so far as to militate against the conclusion which we have reached. The effect of such foreclosure, even by a sale of the premises under a power of sale

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conferred in the mortgages, would be to cut off and bar the equity of redemption, and reduce it to a mere statutory right of redemption after the lapse of two years, at least in ordinary cases.—*Comer v. Sheehan*, 74 Ala. 452. This would leave in Joseph C. Bradley no interest which was the subject of sale under execution or decree of the Chancery Court, such statutory right of redemption not being property, but a mere privilege.—*Childress v. Monette*, 54 Ala. 317. In this aspect of the case, the defendants having purchased no interest in the lands at the Register's sale made in November, 1883, because Bradley, the judgment debtor, had none, there is nothing for appellants to redeem.

It is true that the inference may be drawn from the record, that the mortgagees purchased at their own sale, which they made under the power, and that such sale may be disaffirmed at the election of the mortgagor, or those claiming under him, on complaint seasonably expressed in a court of equity. But the rule is settled, that "no person can come into a court of equity for a redemption of a mortgage, but he who is entitled to the legal estate of the mortgagor, or claims a subsisting interest under him."—*Rapier v. Gulf City Paper Co.*, 64 Ala. 330; 2 Jones Mortg. § 1055. The mortgagor here is Mrs. Bradley, in whom was the legal title of the mortgaged property, and the conveyance itself imports that she is the owner, and that her husband unites with her rather as husband and trustee than strictly as a grantor. The complainants neither aver nor prove any privity of title from her, and hence they can not claim any right or favor under the operation of this principle.

These views are conclusive of the case, and it is needless therefore to consider other questions presented in argument. The decree of the chancellor dismissing the bill is, in our opinion, free from error, and must be affirmed.

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Action on Promissory Note, by Assignee against Maker.

1. *Waiver of exemptions.*—A waiver of all exemptions, contained in a promissory note, though inoperative as to the homestead (Code, § 2848), is valid and effectual as to personal property.

2. *When appeal lies.*—When the minute-entry, as set out in the record, recites only the verdict of the jury, and the award of an execution thereon, the appeal will be dismissed by the court, *ex mero motu*, because there is no judgment which will support it.

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APPEAL from the Circuit Court of Colbert.

The record does not show the name of the presiding judge.

This action was brought by James E. Keenan, against John Wagnon, and was commenced on the 12th February, 1884. The cause of action, as set out in the original complaint, was a "waive note" executed by the defendant, dated the 4th February, 1878, and payable one day after date, to Keenan & Co.; but, in the amended complaint, a count was added on another note under seal, signed by the defendant and one A. J. Wagnon, dated March 21st, 1879, payable one day after date, to the order of Keenan & Co. The first note contained a waiver of exemptions, expressed in these words: "I waive, as against this note, all rights of exemption to real and personal property, under the constitution and laws of Alabama;" and the second contained a similar waiver, signed by both of the makers. The only judgment shown by the record is in these words: "Came the parties," &c., "and issue being joined, thereupon came a jury," &c., "who, on their oaths, do say, we, the jury, find for the plaintiff, and assess his damages at \$247.90, besides costs; for which let execution issue. And it appearing that the defendant, in the note, the basis of this suit, waived the exemptions secured to him by law and the constitution, it is ordered that the clerk indorse said waiver on said execution." The defendant appeals, and assigns various errors; and there is a joinder in error by the appellee.

JAMES JACKSON, for appellant.

J. T. KIRK, *contra*.

CLOPTON, J.—The waiver of exemptions in the bond sued on extends, in terms, to real and personal property. As a waiver of the homestead, it is inoperative, by reason of the mandatory provision of the statute, that when the waiver relates to realty, it shall be made by a separate instrument in writing. This, however, does not render the entire waiver invalid and inoperative. If the waiver clause in the bond can not operate to the extent designed by the parties, it must be made to operate as far as possible to effectuate their intention. The clause is operative as a waiver of the exemptions of personal property. *Neely v. Henry*, 63 Ala. 261; *Terrell v. Hurst*, 76 Ala. 588. The proper judgment-entry in such case will be found in *Brown v. Leitch*, 60 Ala. 313.

The appeal must be dismissed. The verdict of the jury is sent up with the record, but there is no judgment rendered by the Circuit Court thereon. The plaintiff, in whose favor the verdict was returned, can not proceed, until he has, by motion to

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the Circuit Court, judgment rendered on the verdict, *nunc pro tunc*.—*Hall v. Cannon*, 9 Por. 274. There is no judgment which we can affirm, reverse, or amend without a reversal; and we are compelled to dismiss the appeal, *ex mero motu*.

Appeal dismissed.

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Bill in Equity, in matter of Probate of Will, Administration, and Settlement of Decedent's Estate.

1. *Probate of wills; jurisdiction of Probate Courts*.—In the probate of wills, as well as the grant of letters testamentary or of administration, the Probate Court not only has exclusive jurisdiction, but possesses all the powers and attributes of a court of general jurisdiction; and every intendment will be indulged in favor of its rightful exercise of the jurisdiction, while nothing will be presumed against the regularity and legality of its action.

2. *Same; transcript of record*.—A transcript from the records of the Probate Court, which contains only a copy of the will, and an affidavit of the subscribing witnesses, made before the judge of probate, as to its due execution, not followed by any order, decree or judgment of the court, does not show a probate of the will.

3. *Same; notice of application for probate; appointment of guardian ad litem for infants; trial by jury, of contest*.—When the probate of a will, or of parts only of the paper purporting to be a will, is collaterally attacked, it is not necessary that the record shall affirmatively show notice of the application, the appointment of a guardian *ad litem* for the infants, or the summoning or waiver of a jury: in the absence of averment and proof to the contrary, the proceedings in these several matters will be presumed to have been regular.

4. *Settlement of decedent's estate in equity; averments of bill*.—When a bill seeks to compel a final settlement of a decedent's estate, it must aver or show that the estate is ready for a final settlement.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. N. S. GRAHAM.

The bill in this case was filed on the 18th March, 1881, by Mrs. Hattie M. Acklen, the widow of Theodore Acklen, deceased, and their children, against Mrs. Corinne A. Goodman, her husband and her child, and against Charles W. Halsey, as the administrator *de bonis non* of the estate of William Acklen, deceased, who was the father of said Theodore Acklen and Mrs. Goodman; and sought to set aside and annul the probate of a paper, or specified parts thereof, as the last will and testament of said William Acklen, as granted and declared by the Probate Court of Madison on the 4th December, 1872, to establish the entire paper as his will, and to have the estate

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administered and distributed under its provisions. The cause being submitted for decree, as therein recited, "on the bill of complaint, answer of defendants Walter A. Goodman and Corinne A. Goodman, and exhibits, being a transcript from the order of the Probate Court of Madison county probating the will of William Acklen, deceased, and a copy of said will, &c.," the chancellor dismissed the bill, holding that, "under such facts and statements as are made in the bill, the jurisdiction of the Probate Court is original and exclusive, and its decree is final and conclusive." The complainants appeal from this decree, and here assign it as error.

R. E. SPRAGINS, for the appellants.

D. D. SHELBY, and R. W. WALKER, *contra*.

STONE, C. J.—The controlling purpose of the present bill is, to set up and establish, as valid, an alleged probate of the will of William Acklen, deceased, charged to have been granted June 8, 1872, and to set aside and annul, as improperly granted, a probate of parts of the same will, granted in December, 1872. The estate has been administered under the probate ordered and decreed in December; and a second purpose of the bill is, to have the estate administered and distributed under the alleged probate of June 8, 1872. In the probate of wills, and in granting letters testamentary and of administration, the Probate Court has not only exclusive jurisdiction, but has all the powers and attributes of a court of general jurisdiction. Every intendment will be indulged in favor of its rightful exercise of the power, and nothing will be presumed against the regularity or legality of its action, which the record does not affirmatively show to be so.—2 Brick. Dig. 530, § 83; *McGrews v. McGrews*, 1 St. & P. 30; *Hardy v. Hardy*, 26 Ala. 524; *Deslonde v. James*, 29 Ala. 92; *Hall v. Hall*, 47 Ala. 290; *Goodman v. Winter*, 64 Ala. 410; *Matthews v. McDade*, 72 Ala. 377.

We find no note of testimony in the present transcript; but the final decree of the chancellor recites, that the "cause was submitted for decree, on the bill of complaint, answer of defendants, Walter A. Goodman and Corinne A. Goodman, and exhibits, being a transcript from the order of the Probate Court of Madison county, probating the will of William Acklen, deceased, and a copy of said will." The bill dispensed with sworn answer, and the answers were put in without oath. What is called exhibit "A. A." to the bill, is in no sense a probate. It is but a copy of the will, with the joint affidavit of Weeden and Binford, describing themselves as subscribing witnesses, bearing date June 8, 1872, and testifying to its due execution

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by Acklen, the testator. No order of the court is shown to have been made thereon, nor any action taken upon said affidavits. So, the transcript from the Probate Court has no certificate attached, and we can not know what preceded, or followed it, if any thing. The record is silent on that subject. It bears date December, 1872, relates to the estate of William Acklen, deceased, and recites, "This day came the parties, by attorneys," &c. It then proceeds to declare, that certain named parts, or items of said testamentary paper, are proven, established and probated, as the last will and testament of the said William Acklen, and orders that letters testamentary be issued to the executor named.

We infer from some averments in the bill, and from the argument of counsel, that an effort was made to show there was no notice given of the application to probate the will, and that, on the trial, the infant legatees were not represented by guardian *ad litem*. It is true that the alleged transcript from the Probate Court, found in this record, fails to show notice, and fails to show there was a guardian *ad litem* for the infants. It is equally true that it fails to show these preliminary duties were omitted. Under the rule as to intendments declared above, we feel bound to presume on collateral attack, such as this, that every step in the proceedings was regularly taken, which the record does not affirmatively show to have been otherwise. The same rule applies to the alleged absence of a jury, to pronounce on the contest of the will.—Code of 1876, § 2320; *Merrill's Heirs v. Morrissett*, 76 Ala. 238; *Jaques v. Horton*, 76 Ala. 432.

The averments of the bill, which seek to raise this question, are found in section three. It avers that certain papers and citations are not shown in the Probate Court. This is not the equivalent of an averment that no such papers ever existed. They may have been lost, destroyed, or removed. There is, however, an averment that the minors, residents of the county of Madison, were not made parties to the said proceedings by summons, service, and acceptance and appointment of a guardian *ad litem*. The answer to this averment is in the following language: "As to the further allegations of said third paragraph of complainants' bill, these respondents are not advised, do not know, and can not further answer." So, the pleadings do not aid the proof, which is otherwise fatally defective.

In what we have said above, we have not inquired whether equity would grant the relief prayed, if the averments and proof were full. We decide nothing on that question.—See *Glass v. Glass*, 76 Ala. 312. The bill, as framed, is wholly insufficient as a bill simply to bring the administration to a settlement. It does not aver the estate is ready for final settlement.

It is manifest that the chief purpose of this suit rests on the

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postulate, that if Mr. Acklen's will had been probated in its entirety, Mrs. Goodman and the several children of Theodore Acklen would have taken *per capita* and equally under its provisions. Without intending to decide this immaterial question, we may be pardoned for expressing grave doubts, if such is its proper interpretation.

The decree of the chancellor is affirmed.

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Final Settlement of Accounts of Deceased Administrator.

1. *Transactions with, or statements by decedent; who may testify as to.* On the final settlement of the accounts of a deceased administrator, between his personal representative and the administrator *de bonis non*, an heir or distributee of the intestate's estate, being presumptively interested in the result of the proceeding, is incompetent to testify as to any transaction with, or statement by the deceased administrator, in connection with the assets of the estate (Code, § 3058), unless called to testify by the opposite party.

2. *Conflict between judgment-entry and bill of exceptions.*—As to matters of which the bill of exceptions should properly speak—*e. g.*, the ruling of the court on a motion to exclude evidence—its recitals must control the contradictory recitals of the judgment-entry.

3. *Re-taking deposition, without order of court.*—When a deposition is re-taken by the same party, without an order of court allowing it, a motion to suppress it, on that ground, is addressed to the discretion of the court, and its refusal is not revisable on error.

4. *Affidavit for deposition; sufficiency in identifying cause.*—When an affidavit, made by the attorney of H. J. as administrator of S. J., deceased, for taking a deposition, describes the cause as "a cause now pending in said Probate Court, in the matter of the final settlement of the estate of S. J., deceased;" this is sufficient to identify it as a proceeding, then pending in said court, for the final settlement of the accounts of J. M., deceased, as administrator of said S. J.'s estate, between his personal representative and said H. J. as administrator *de bonis non*; especially in the absence of proof of any other cause or proceeding, then pending in said court, with which it might be confounded.

5. *To what witness may testify.*—A witness can not be asked, nor can he be allowed to state, his "reasons for believing" any fact.

6. *Proof of inventory and report of sale by administrator.*—An inventory or report of sales, made by an administrator, though *prima facie* sufficient to charge him, is not conclusive against him; and the parties in adverse interest, seeking to charge him or his estate, may prove the facts without reference to the inventory or report.

APPEAL from the Probate Court of Marshall.

Tried before the Hon. THOS. A. STREET.

In the matter of the final settlement of the accounts and vouchers of James H. Moore, deceased, as administrator of the

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estate of Simon Jacobs, deceased ; between A. J. McDonald, as the administrator of said Moore's estate, and Henry G. Jacobs, as administrator *de bonis non* of said Simon's estate. During the progress of the trial, or hearing, as the bill of exceptions states, said H. G. Jacobs offered one Charles Jacobs as a witness, who was a son of said Simon Jacobs ; and to whose competency, "as to any thing that was done by said James H. Moore at the sale of the personal property of said estate, or what said Moore said, or what property he received from the home place of said Simon Jacobs," Moore's administrator objected, "because of interest, and because of incompetency under section 3058 of the Code." The court overruled the objection, and allowed the witness to testify ; to which ruling Moore's administrator excepted. The same objection was made to the competency and testimony of said H. G. Jacobs as a witness for himself, and an exception was duly reserved to the overruling of the objection.

Before entering on the trial, Moore's administrator moved the court to suppress the deposition of James Bush, which had been taken on interrogatories and cross-interrogatories ; the principal grounds of the motion being, that the deposition had been before taken in the cause, and the former deposition had not been suppressed, nor an order made for taking it a second time ; and that the affidavit did not sufficiently identify the cause. The affidavit was made by one of the "attorneys of said H. G. Jacobs, as administrator *de bonis non* of the estate of Simon Jacobs, deceased," and stated that said Bush "is a material witness for contestant, in a cause now pending in the Probate Court of said county, in the matter of the final settlement of the estate of Simon Jacobs, deceased." The court overruled the motion to suppress, and an exception was duly reserved by Moore's administrator.

Moore's administrator also moved to suppress the answers of this witness to "the 3d, 4th, 12th, 27th-29th, 34th, and 35th direct interrogatories," to which objections were duly interposed at the time of filing cross-interrogatories. These interrogatories all related to the sale of property belonging to the estate of said Simon Jacobs, made by said Moore as administrator, and were intended to show the amount and value of the property that went into the hands of said Moore ; as shown by the following : (3.) "Were you, or not, familiar with the property of said Jacobs' estate at that time." (4.) "Who was the administrator of the estate?" (12.) "Were you present at the sale?" (13.) "Give your estimate of the amount of property sold." (29.) "Give your reasons for believing that money went into the hands of the administrator." The answer to the 29th interrogatory was : "I have no reason

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or knowledge of my own that he had any money, only rumors were that he had plenty." The objection specified to the 29th interrogatory was, that it called "for illegal evidence, being matter of belief, or reasons for a belief, and mere hearsay;" and to the others, principally, that they called for "secondary evidence as to matters of which there is higher and better evidence." The court overruled these several objections, and Moore's administrator duly reserved exceptions.

All the rulings to which exceptions were thus reserved, with other matters which it is unnecessary to notice, are now assigned as error.

HAMILL & LUSK, for appellant.

WINSTON & JONES, *contra*.

SOMERVILLE, J.—The witnesses, Charles Jacobs and Henry Jacobs, were both interested, presumptively, in the result of the present proceeding before the probate judge, as heirs of Simon Jacobs, deceased. They were incompetent, therefore, to testify as to any transaction with, or statement by the decedent, Moore, whose administrator was one of the parties to this proceeding, and whose estate was interested in the result of it. We have uniformly construed section 3058 of the Code (1876), to embrace within its scope mere *beneficiaries*, who are not parties to the record, but who claim as heirs, legatees, or otherwise, in succession under a decedent, whose personal representative is a party to the suit or proceedings under review, unless such persons are called to testify as witnesses by the opposite party.—*Goulettt v. Kelly*, 74 Ala. 213; *Keel v. Larkin*, 72 Ala. 493; *Drew v. Simmons*, 58 Ala. 463; *McCrury v. Rash*, 60 Ala. 374; *Birford v. Denient*, 72 Ala. 491; *Dudley v. Steele*, 71 Ala. 423. The court erred in refusing to sustain the objection taken by appellant to the competency of each of these witnesses.

The judgment-entry of the court, it may be proper to notice, recites that the motion to exclude these two witnesses was sustained; but this is in conflict with the bill of exceptions, and the rule is settled, that as to matters of which the bill ought to speak, its statements predominate over the recitals of the judgment.—*Hurst v. Bell*, 72 Ala. 33; 1 Brick. Dig. 252, § 139; *Reynolds v. The State*, 68 Ala. 502.

The action of the court in refusing to suppress the deposition of the witness Bush was free from error; the whole question being one within the discretion of the court, so far as it was affected by the fact that a previous deposition of the same witness had already been taken. Where a deposition is retaken

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by the same party, without an order of court allowing it to be done, its admission or rejection is discretionary with the judge, and, like the action of the trial court in permitting a witness to be recalled, is not revisable on appeal.—*Brounax v. Sullivan*, 29 Ala. 320; *Herbert v. Hanrick*, 16 Ala. 581; *Hexter v. Lumpkin*, 4 Ala. 509; Weeks on Depositions, § 535.

The affidavit made for the taking of this deposition was sufficiently certain to identify the cause in which it purported to be taken, describing it as “a cause now pending in the Probate Court, in the matter of the final settlement of the estate of Simon Jacobs, deceased;” and designating the affiant as an attorney for Henry G. Jacobs, administrator *de bonis non* of said estate, who is one of the parties to this cause. No other cause, moreover, is shown to have been pending in the court, with which this could be confounded, so that no latent ambiguity is shown to exist in the subject of reference.

The objections urged to the various interrogatories and answers in the deposition of Bush were properly overruled, except the one numbered 29. This called for the witness’ “*reason for believing*” a certain fact, and the answer given was equally irrelevant. It is true that the decedent, being himself an administrator, may probably have made out an inventory of the personal property which went into his hands for administration; and this would be sufficient, *prima facie*, to charge him on settlement, for all articles enumerated in it. But it is not conclusive, even as against him, much less against others, who are interested. The same is true of an administrator’s report of sale made to the Probate Court. He is always permitted to show errors and mistakes in such documents. These papers can not be regarded as binding, in any manner, upon one who, as contestant, seeks to charge an administrator upon settlement for property shown to have gone into his hands and belonging to the estate. Such contestant may prove the facts, without any reference to such inventory or report; and these papers can not, therefore, be said to be the best evidence of such facts. The matter sought to be proved may amount to a falsification of the papers.

The judgment must be reversed, for the error above adverted to; and we do not consider the other assignments of error, as the points raised are not likely to arise upon another trial.

Reversed and remanded.

[Barelift v. Treece.]

Barelift v. Treece.*Action on Promissory Note, payable to Committee of Lunatic.*

1. *Grant of administration ; jurisdiction of Probate Court under constitutional provisions.*—In the grant of administrations, the jurisdiction of the Probate Court is derived from constitutional provisions, and is original, general, and unlimited ; when exercised, the presumption is indulged, that the court previously ascertained the existence of the necessary jurisdictional facts ; and when the record asserts the jurisdictional facts, the presumption is conclusive, though it may be that, when the record is silent, the entire want of jurisdiction can be shown.

2. *Same ; under statutory provisions.*—This general grant of jurisdiction over the subject-matter, conferred by constitutional provisions, is distributed among the Probate Courts of the several counties, by statutory provisions designating the special cases in which each may act (Code, § 2349) ; and when any court, in the exercise of this jurisdiction, erroneously adjudges that any particular case is within its local jurisdiction, the grant of administration is not void, but may be avoided by a direct proceeding for the purpose.

3. *Same ; what are "assets" within county.*—A promissory note, or other chose in action, on which a suit is pending when the plaintiff dies, will support a grant of administration on his estate by the Probate Court of some county ; and the validity of the grant can not be assailed by the defendant, on the ground of a want of assets in that county.

4. *Foreign grant of administration.*—If the deceased plaintiff was in fact domiciled in another State at the time of his death, and letters of administration are there granted on his estate, the foreign administrator thereby acquires no title to the assets here, nor any right to revive and prosecute the suit, without a compliance with statutory provisions (Code, §§ 2637–40) ; and any arrangement between him and the distributees, for the collection and distribution of the estate, can not bar the further prosecution of the action by the administrator appointed here.

5. *Alteration of note ; special plea averring.*—In an action on a promissory note, a special plea of *non est factum* being interposed, averring a material alteration in the date, proof of the signature is not necessary to the admission of the instrument as evidence ; if there is a suspicious alteration on its face, the *onus* is on the plaintiff to explain it ; but, if not, the *onus* is on the defendant to show that it has been altered.

APPEAL from the Circuit Court of Blount.

Tried before the Hon. LEROY F. BOX.

This action was brought in the name of James A. Reid, who was described as "a lunatic, who sues by his next friend, S. S. Walker," against John Reid ; was commenced on the 5th September, 1874, and was founded on a bond, or promissory note under seal, for \$1,405, executed by the defendant and one A. O. Walker, who was not sued. The instrument sued on is not set out in the record, but it was described in the complaint as

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"payable to J. Felix Walker, committee for said James A. Reid," and as dated the 10th day of June, 1851, or (in the second count) 1857. The defendant filed a special plea, verified by affidavit, alleging that the instrument sued on "was not executed by him at the time it purports to bear date, nor by any one authorized to bind him; that the said bond has been changed and altered, without his authority or consent, since the execution and delivery thereof, from, to-wit, the 10th June, 1857, to the 10th June, 1851." The defendant having afterwards died, the suit was revived against H. H. Barclift as his administrator; and the death of the plaintiff, said James A. Reid, being afterwards suggested, the suit was revived in the name of Daniel A. Treece, to whom, as sheriff, letters of administration on his estate were granted by the Probate Court of St. Clair county, but at what time the record does not show.

The defendant administrator appeared, and filed two special pleas, as follows: (1.) That said James A. Reid died, intestate, in South Carolina, where he resided and was domiciled; that he left no assets in said county of St. Clair, and no assets of his estate were afterwards brought into said county; that the Probate Court of said county of St. Clair had no jurisdiction, authority or right to appoint the sheriff of said county, *ex officio*, as administrator of said James A. Reid, "and that said plaintiff, as sheriff as aforesaid, is not now, and never was, *ex officio*, administrator of said decedent." (2.) That said James A. Reid died in South Carolina, where he resided, intestate, and free from any debts, claims or demands against his estate; that the heirs at law and distributees of his estate were all of full age at the time of his death; that letters of administration on his estate were regularly granted, in April, 1881, by the proper court in South Carolina having jurisdiction of his estate, to James A. Walker; that the whole estate of said intestate, including the demand here sued on, has, since said grant of administration, "been fully settled, divided and distributed, by and among the said heirs and distributees, and by and with the consent and agreement of said Walker as administrator; and that, as a part of said settlement and distribution, the demand here sued on was, by the said parties in interest, released and set over unto Mary P. Johnson and others, sole heirs and distributees of said estate, and this suit was agreed to be dismissed." The court sustained a demurrer to each of these pleas, and the cause was tried, as the judgment-entry recites, "on issues joined;" but the bill of exceptions states that it was tried "on the following pleas: 1st, a plea averring, in general terms, that the plaintiff was not administrator of said James A. Reid, deceased; 2d, want of consideration; 3d, the special plea filed by the defendant in his life-time, averring an altera-

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tion in the date of the note sued on; and, 4th, a plea suggesting the declaration of the insolvency of said estate, which was, however, confessed and admitted by plaintiff."

On the trial, as the bill of exceptions states, the plaintiff offered in evidence a bond, "as described in the first count in the complaint, purporting to bear date June 10th, 1851"; and the court admitted it, against the defendant's objection, without any proof of its execution, "holding and ruling that said special plea, alleging an alteration in the date of said bond, was not a plea of *non est factum*, and did not put plaintiff upon any proof of the execution of said bond;" to which ruling and action the defendant duly excepted. The plaintiff read in evidence, also, without objection on the part of the defendant, an indorsement of a credit on said bond, and the letters of administration granted to him by the Probate Court of St. Clair county. The defendant offered to prove "that said James A. Reid died, intestate, in South Carolina, being at the time a resident of that State; that he left no assets in said county of St. Clair, Alabama, and that no assets of his estate had since been brought into said county." The court excluded this evidence, on the plaintiff's objection, and the defendant excepted. This being all the evidence, "the question was again raised, during the argument, as to the sufficiency of said special plea; but the court adhered to its former ruling, and held that said plea did not put plaintiff upon any proof of the execution of said instrument; to which ruling and action defendant again excepted."

On this evidence, the defendant requested, in writing, the following charges to the jury: (1.) "If the jury believe the evidence, they must find for the defendant." (2.) "The jury must find for the defendant, on the second count of the complaint, if they believe the evidence, the plaintiff having wholly failed to produce any such bond as therein described." The court refused these charges, and the defendant duly excepted to their refusal; and he now assigns as error the refusal of said charges, and the several rulings of the court on the pleadings and evidence above stated.

HAMILL & DICKINSON, for appellant, cited *Coltart v. Allen*, 40 Ala. 155; *Bradley v. Broughton*, 30 Ala. 694; *Miller v. Jones*, 26 Ala. 247; 1 Wms. Ex'rs, 377-8; Whart. Ev. 629.

CLOPTON, J.—The action was brought in the name of the plaintiff's intestate, who was a lunatic, by his next friend, to recover on a bond, executed by the defendant's intestate, and payable to one Walker, "committee" for the plaintiff. The plaintiff died during the pendency of the suit, and it was revived in the name of the appellee, as his personal representa-

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tive, to whom administration was committed by the Probate Court of St. Clair county. Thereupon, a plea was interposed, negating the existence of the statutory facts which gave that court authority to grant administration, and averring that it was without jurisdiction.

The jurisdiction of the Probate Court in the grant of administrations, being derived from the constitution, is original, general, and unlimited; and when exercised, the presumption is, that the court previously ascertained the existence of the jurisdictional fact.—*Burke v. Mutch*, 66 Ala. 568. In support of the jurisdiction, everything which the record does not disprove is presumed, and the presumption is conclusive on a collateral attack, when the record asserts the jurisdictional fact. But, when it is silent, it may be that the *entire* want of jurisdiction can be shown.—*Hatchett v. Billingslea*, 65 Ala. 16.

The constitutional grant confers jurisdiction over the subject-matter. The statute (Code, § 2349) designates the particular cases, wherein the courts have authority to grant jurisdiction within their respective counties. The original and general grant relates to the subject-matter, while the statutory authority concerns special cases arising under the constitutional grant. When there is no subject-matter, on which the general grant can operate, there is no ground of jurisdiction in any Probate Court of the State; but, when there is a subject-matter, which gives some Probate Court in the State jurisdiction, and the court of another county erroneously adjudges that the case pertains to its local jurisdiction, the grant of administration may be avoided by a direct proceeding for that purpose, but is not void.—*Coltart v. Allen*, 40 Ala. 155. The difference consists in the distinction between jurisdiction of the subject-matter, and local jurisdiction of a particular case.

The bond sued on constituted assets in the State, sufficient to give jurisdiction to some Probate Court. The action having been brought by the plaintiff's intestate in his life-time, and administration having been granted by the Probate Court of St. Clair county, though it may have been erroneously adjudged that the case pertained to its jurisdiction, it is not permissible for the defendant to assail, in this suit, the validity of the grant of administration to the plaintiff. His letters of administration, under such circumstances, are conclusive evidence of his authority until revoked, and exclude every other Probate Court from jurisdiction, and extend to all the property of the deceased in this State.—Code, § 2376.

The letters of administration granted in South Carolina, the domicile of the decedent, have no extra-territorial operation. Without compliance with the provisions of our statutes, the foreign administrator has no authority to recover or receive

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assets located in this State.—*Hatchett v. Berney*, 65 Ala. 39. No title to the personal property situated here is cast on him or the distributees; and no arrangement between them for the distribution of the estate, including the bond sued on, can operate to defeat the title of the personal representative appointed in this State, or his right to recover the personal assets in this jurisdiction, or divest the domestic court of jurisdiction of the administration. The suit could be revived and prosecuted only by a personal representative, and such arrangement and distribution do not bar the further maintenance of the action.

When *non est factum*, denying the *execution* of the instrument the foundation of the suit, is pleaded, it is proper, if the instrument is correctly described in the complaint, to permit it to be read to the jury, without any additional evidence, in order that the plaintiff may offer proof of its genuineness, or that it was the defendant's act.—*Catlin v. Gilden*, 3 Ala. 536; *Morris v. Varner*, 32 Ala. 499. The plea filed by the defendant's intestate, though in legal effect a plea of *non est factum*, virtually admitted the genuineness of the signature to the bond, but denied its validity, or that it was the defendant's act in law, because of an alleged alteration in the date. It is unnecessary to prove what is admitted by the plea. In such case, the rules applicable are those which govern in cases of altered instruments. If a suspicious alteration is apparent on the bond, it is incumbent on the plaintiff to furnish a satisfactory explanation; but, if it is not apparent, the *onus* is on the other party to show that it has been altered. The bill of exceptions, which purports to set out all the evidence, does not state there was any apparent alteration. Proof of the signature to the bond was not antecedent and preliminary to reading it to the jury. The objection to its introduction was prematurely made. If additional evidence was necessary, and not offered, the question should have been raised by a motion to exclude, or by a charge on the effect of the evidence.

On the clear and uncontroverted facts shown by the record, the plaintiff has a right to recover; and as it affirmatively appears that the recovery did not exceed the amount to which he is entitled, the refusal of the second charge asked by defendant is, if erroneous, error without injury.

Affirmed.

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[Clements & Wife v. East Tenn., Va. & Ga. Railroad Co.]

Clements & Wife v. East. Tenn., Va. & Ga. Railroad Co.

Action against Railroad Company, for Personal Injuries.

1. *Abandonment of special plea.*—When a demurrer to a special plea is overruled, and a demurrer to a replication thereto is sustained, while the bill of exceptions, purporting to set out all the evidence, shows that no evidence was introduced as to the issue thus presented, this court will consider the defense as abandoned, and will not revise the rulings on the demurrer.

2. *Liability of railroad company, for injuries to persons or property by negligence ; burden of proof.*—The liability of a railroad company for damages resulting from a failure to comply with statutory requirements, or from other negligence, whether to persons, or to stock or other property, is the same (Code, §§ 1699, 1700) ; but, where the injury is to stock or other property, the *onus* of showing a compliance with the statutory requirements is imposed on the railroad company, and without this proof it does not relieve itself of the imputation of negligence ; but the statute does not extend this rule to actions for personal injuries.

3. *Contributory negligence as defense.*—The court does not assent to the proposition, that contributory negligence on the part of the plaintiff, though proximate, is no defense to the action, if the railroad company was guilty of negligence, or omission of duty, which aided in bringing about the injury.

APPEAL from the Circuit Court of Talladega.

Tried before the Hon. LEROY F. BOX.

This action was brought by Benjamin A. Clements and his wife, Mrs. Tempe Clements, against the East Tennessee, Virginia & Georgia Railroad Company, to recover damages for personal injuries sustained by Mrs. Clements through the negligence and carelessness, as alleged, of the defendant's agents and servants in charge of an engine and train of cars ; and was commenced on the 1st March, 1882. The defendant was described, in the summons and complaint, as a "corporation created and existing by and under the laws of the State of Alabama, in the State of Alabama, and doing business in said county of Talladega." A special plea of *nul tiel* corporation was interposed, to which the plaintiffs demurred ; and their demurrer being overruled, they filed a special replication, to which the court sustained a demurrer on some of the grounds assigned, but overruled it as to others ; and the cause seems to have been tried on issue joined on the plea of not guilty.

On the trial, a bill of exceptions was reserved by the plaintiffs, which purports to set out "substantially all the evidence,"

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the following being the material facts: The plaintiffs resided in Clay county, and went to Talladega for the purpose of selling some chickens, beef, &c., which were carried in a wagon drawn by two oxen. The wagon was driven by one Clark, while plaintiffs accompanied it in a buggy drawn by a mule. Not finding a market for their goods in the town of Talladega, they drove out among the suburbs, and were overtaken by night before their return. "Returning towards the town by the public road usually travelled, they crossed the defendant's said railroad at a public crossing known as *Parsons' Crossing*. Before reaching said crossing, a train of cars passed on defendant's road, within fifty or seventy-five yards ahead of them, having a head-light burning, ringing the bell, and blowing the whistle, as required by law; and plaintiffs' mule being unaccustomed to such sights and sounds, plaintiff took precautions against trouble with the mule, by getting out of the buggy, and holding him until the train passed." Plaintiffs then crossed the railroad, and, not being well acquainted with the road, and the night being dark, they determined to camp out; the place being described as "an open grove, within fifty to seventy yards of said railroad, on the side of the public road, and about the same distance from *Parsons' Crossing*;" and plaintiffs' evidence tended to show that this place was suitable for camping, and that it had been used on former occasions, by other persons, for camping purposes. While the plaintiff and Clark were making preparations for camping, and were trying to catch the oxen, which had gotten loose, Mrs. Clements was left sitting in the buggy, holding the reins in her hands; and while they were thus engaged, another train on the defendant's road passed by, which frightened the mule; whereby plaintiff's wife was jerked out of the buggy, and sustained serious injuries. Clark and the plaintiff testified positively that this train had no head-light burning, and that it gave no signal of its approach; while an engineer of the road testified, as a witness for the defendant, to the contrary.

On this evidence, the court charged the jury, "that even though they should find, from the evidence, that defendant was negligent, yet, if plaintiffs' negligence contributed proximately to the injury, then plaintiff can not recover." The court charged the jury, also, at the written request of the defendant, as follows: (1.) "The failure of the defendant to ring the bell, at or near *Parsons' Crossing*, if it did occur, can not be complained of by plaintiffs in this action, unless said failure did actually injure Mrs. Clements; and this matter the jury must consider, in determining how and in what manner plaintiffs' mule was injured." (2.) "If the jury believe, from the evidence, that the plaintiffs' negligence and want of proper

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care and precaution contributed to the injury to Mrs. Clements, then plaintiffs can not recover in this action."

The plaintiffs duly excepted to each of these charges, and then requested the following charges, in writing: 1. "If the jury find, from the evidence, that Mrs. Clements was injured as alleged in the complaint, in the night-time, and within forty or fifty yards of where a public road crosses the defendant's railroad; then the defendant is liable for the injury, unless the jury also find, from the evidence, that the defendant's agents and servants performed all the requirements imposed by the statute upon those who have charge of an engine and train approaching a public road crossing in the night-time; and the burden of showing a compliance with those requirements is upon the defendant." (2.) "If the jury believe, from the evidence, that Mrs. Clements was injured as alleged in the complaint, in the night-time, and near where a public road crosses the defendant's railroad; then no question of contributory negligence arises, or can be considered by the jury, until they are first satisfied, by the evidence, that the head-light of the engine on the train was burning, and, in addition thereto, that the whistle was sounded, or the bell rung, one-fourth of a mile before said train reached said crossing." (3.) "In the employment of steam as a motive power, railroad companies are held to the exercise of extraordinary diligence, and are required to employ very careful and prudent men; and such employees must, in the management of such motive power, exercise extraordinary care and prudence, to prevent damage resulting from its use. In this case, if it appears that the defendant's employees did not exercise such diligence as the law requires, it would not relieve the defendant from liability to show that plaintiffs themselves had been careless or imprudent." (4.) "If the jury believe, from the evidence, that Mrs. Clements was injured near the defendant's railroad, and within forty or fifty yards of *Parsons' Crossing*; and that said crossing is where a public road crosses said railroad; and that Mrs. Clements' injuries were caused by one of defendant's trains frightening the mule, and causing it to drag her from the buggy; then, under the law, it is the duty of the defendant to reasonably satisfy the jury, by the evidence, that its servants did every thing required by law of persons in charge of a train approaching a public road crossing; and if the jury believe, from the evidence, that the injury complained of was inflicted at the place above stated, and in the night-time, then the evidence must show to the satisfaction of the jury that there was a head-light burning on the engine, and that the whistle was sounded, or the bell rung, one-fourth of a mile before reaching said crossing; and if the defendant has failed to prove these

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facts, the verdict of the jury must be in favor of the plaintiffs, for such sum as, in the opinion of the jury, they are entitled to recover on account of the injuries received by Mrs. Clements."

The court refused each of these charges, and the plaintiffs excepted to their refusal; and they now assign as error the charges given, the refusal of the several charges asked, with the adverse rulings on the pleadings, and several rulings on evidence which require no notice.

HEFLIN, BOWDON & KNOX, and PARSONS & PARSONS, for appellants.

BRADFORD & BISHOP, *contra*.

STONE, C. J.—There was a plea of *nul tiel* corporation, a replication to it, and a demurrer to the plea and to the replication. The Circuit Court made some rulings on these pleadings, but it is unnecessary to consider them. The bill of exceptions informs us it contains substantially all the evidence, and not a word of testimony was offered on this issue, nor was there any ruling of the court given or asked upon it, other than that upon the demurrers. The case was tried precisely as if no question had been raised on the name of the corporation. This line of defense must have been abandoned, and we will not consider it.

The injury complained of, it is contended, was inflicted at or near a public road crossing. The statute (Code of 1876, § 1699) has prescribed certain duties to be performed by officers in charge of trains, when approaching or passing such public road crossing. The whistle must be blown, or the bell sounded, one-fourth of a mile before reaching such crossing, &c.; and if it be in the night-time, the train must have a head-light burning. It has been several times decided in this court, that if the injury is done at a public road crossing, or other place specifically mentioned in section 1699, then the railroad does not relieve itself of the imputation of negligence, unless it proves a compliance with the said statutory requirements. Each of these decisions, however, was pronounced in cases where loss of, or injury to property, was the cause of action.—*Nashville & Decatur R. R. Co. v. Comans*, 45 Ala. 437; *M. & O. R. R. Co. v. Williams*, 53 Ala. 595; *S. & N. R. R. Co. v. Thompson*, 62 Ala. 494; *S. & N. R. R. Co. v. Williams*, 65 Ala. 74; *Ala. Gr. So. R. R. Co. v. McAlpine*, 71 Ala. 545; *E. T., Va. & Ga. R. R. Co. v. Bayliss*, 74 Ala. 150.

In cases of injury to property, at points on the railroad
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other than those at which the whistle is required to be blown, or the bell sounded, the rule is different. It is enough, in such cases, even if there be a failure to conform to regulations, or if those in charge of the train are guilty of negligence, if it be shown that such injury did not result from the negligence of the road's employees. In other words, unless the relation of cause and effect exist between the negligence and the injury, the road is not liable.—*E. T., Va. & Ga. R. R. Co. v. Bayliss*, 75 Ala. 466; *Ala. Gr. So. R. R. Co. v. McAlpine*, 75 Ala. 113; *M. & C. R. R. Co. v. Bibb*, 37 Ala. 599; *Cook v. R. R. Co.*, 67 Ala. 533.

The statute, however, in fixing the burden of proof, makes a distinction between injuries to property, and injuries to persons. Its language (Code, § 1700) is: "A railroad company is liable for all damages done to persons, stock, or other property, resulting from a failure to comply with the requirements of the preceding section, or any negligence on the part of the company or its agents; and when any stock is killed or injured, or other property damaged or destroyed, by the locomotive or cars of any railroad, the burden of proof, in any suit brought therefor, is on the railroad company, to show that the requirements of the preceding section [1699] were complied with at the time and place when and where the injury was done." This statute, when declaring the liability of railroads, makes it the same for injuries to persons, as for injuries to property. It is for all damages done to either, resulting from a failure to comply with statutory requirements, or from other negligence. If the statute had stopped here, no one would have disputed the proposition, that to maintain a suit for damages done to either person or property, the damage or injury must be the resultant of negligence or want of care on the part of the railroad employees. There must have existed between them the relation of cause and effect. But the statute did not stop here. It proceeded to declare on whom the burden of proof rested, and, in doing so, dropped the subject of persons, and confined its operation to stock killed or injured, and to other property. When the suit is for a wrong to property, the burden is on the railroad to show a compliance with the requirements of section 1699. On this provision rests the ruling declared in *M. & O. R. R. Co. v. Williams*, 53 Ala. 595, and the cases which followed it.

There is no such provision, when the suit is for an injury to the person. Why the distinction is taken, it is not for us to say. Sufficient that *ita est scripta lex*. We alluded to this difference in *M. & M. Railway Co. v. Blakely*, 59 Ala. 471. Possibly, the reason of the difference is the one intimated in that opinion. Be this as it may, we find the difference made

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by the legislature itself, and by every sound rule of construction we feel bound to respect it. *Expressum facit cessare tacitum*. When suit is for an injury to the person, the rule, somewhat artificial in its reasoning, declared in the second clause of section 1700 of the Code, does not apply.

We can not agree to the argument, implied in several of the charges asked, that if the railroad company was guilty of negligence, or omissions of duty, which aided in bringing about the injury, then contributory negligence on the part of the plaintiff, though proximate, is no defense to the action.—*M. & C. R. R. Co. v. Copeland*, 61 Ala. 376; *Cook v. R. R. Co.*, 67 Ala. 533.

Affirmed.

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Statutory Action in nature of Ejectment.

1. *Conveyance to county for "court-house purposes;" what uses are allowable.*—When a town lot, adjoining that on which the court-house is located, is conveyed to the county as a corporation, "to have and to hold so long as the said party of the second part shall use the same for court-house purposes," and with condition that it shall revert to the grantor, "whenever the said party of the second part ceases to use said lot for court-house purposes," the condition is not broken by any incidental or collateral use to which the lot may be temporarily devoted, which does not conflict with its continued use for court-house purposes; as, by the failure to inclose it entirely with a fence, allowing hitching-posts for public use to be erected on the uninclosed portion, or a temporary structure for posting bills.

APPEAL from the Circuit Court of Etowah.

Tried before the Hon. LEROY F. BOX.

This action was brought by Samuel Henfy, against the county of Etowah as a corporation, to recover a town lot in Gadsden, known and described as lot No. 181; and was commenced on the 30th November, 1880. The lot was conveyed to the defendant as a corporation, by the plaintiff, by deed dated November 10th, 1871, in which his wife joined, and the material parts of which are these: "*Whereas* the party of the first part, in consideration that the party of the second part would permanently locate the court-house of said county in the town of Gadsden, and erect and build the court-house upon lot No. 192 in said town, in the plan known as the original plan of said town, they, the party of the first part, would give to the party of the second part lot No. 181 in said original plan of said town,

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to be used by said county of Etowah as a public square for court-house purposes, so long as the said party of the second part retained the court-house for said county on said lot No. 192; but, if the party of the second part should hereafter remove the court-house from said lot, and establish the same at some other point in said county, then the said lot was to revert back, and become the property of the party of the first part: *And whereas* the party of the second part has erected the court-house on said lot No. 192, and, by order of the Court of County Commissioners, located the court-house on said lot: *Now, in consideration of the premises*, and the further consideration of one dollar to us in hand paid by the said party of the second part, we do hereby give, grant," &c., "said lot No. 181 in the original plan of the town of Gadsden; to have and to hold so long as the party of the second part shall use the said lot No. 181 for court-house purposes, and so long as the court-house for said county is located or retained on said lot No. 192, where it is now established; and the said party of the first part will warrant," &c.; "it being understood that said lot No. 181 is to revert back, and become the property of the party of the first part, whenever the party of the second part ceases to use said lot No. 181 for court-house purposes, or removes the court-house from the lot or place where it is now located and established. In testimony," &c.

The plaintiff sought to recover the lot, on the ground of a breach of the condition contained in the deed as to the purposes for which the lot was to be used. On all the evidence adduced, the substance of which is stated in the opinion of the court, the court charged the jury to find for the defendant, if they believed the evidence; and this charge, to which the plaintiff excepted, is now assigned as error.

DENSON & DISQUE, and WATTS & SON, for appellant.

DUNLAP & DORTCH, *contra*.

SOMERVILLE, J.—The action is one of ejectment under the statute, instituted by the appellant, Henry, to recover a lot in the town of Gadsden, which he had conveyed by deed to Etowah county. The lot in controversy adjoins that upon which the court-house of the county is erected, and the deed recites that it is to be "used by said county of Etowah as a public square for court-house purposes," so long as the court-house remains where it then was. The conditions subsequent incorporated in the deed are, that the property shall revert back to the grantor, (1) whenever the county ceases to use the lot for court-house purposes; and (2) whenever the court-house should be

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removed from the adjoining lot, where it was then located and established. It is claimed that the first of these conditions has been violated, by permitting the lot to be used for other than "court-house purposes," and that a forfeiture has thereby accrued, entitling the plaintiff to recover for breach of condition subsequent.

The alleged perversions of use are chiefly three: 1st, leaving a portion of the lot uninclosed by fencing; 2d, allowing, by acquiescence, the town authorities of Gadsden to erect two hitching-posts for use by the public upon this uninclosed portion; 3d, the erection of a structure for posting circus-bills, or pictures, which remained for about thirty days before removal.

What is meant by the phrase "court-house purposes," within the intention of these parties, we need not attempt to define. The customs and usages of a particular State or locality might contribute largely in shaping such a definition. Some of these customs might also be matters so general, and of such common knowledge, as to be the subjects of judicial cognizance, without proof. However this may be, one point is very clear to our mind. No mere incidental and collateral use, to which the lot in question may be temporarily devoted, which does not conflict or interfere with its use by the county for court-house purposes, can be construed to be a breach of the conditions of the deed. It is not said that the lot is to devoted solely and exclusively to court-house uses. The fact that it is denominated "a public square" rather lends color of construction to the contrary view. It is a settled rule, that such conditions are generally to be construed *strictissimi juris*, against the grantor in the deed creating them. The grantor evidently intended that the primary or principal uses, to which the property should be devoted, were those to which public squares around court-houses are usually dedicated. These uses may be periodical, and not incessant. Any collateral or secondary purpose, which does not interfere with these primary uses, can not be construed to be inhibited by the terms of the deed. It might be argued, with as much force, that allowing a political or religious meeting to be held upon the grounds would be a breach of the condition. The evidence shows that the county has never at any time ceased to use the lot for "court-house purposes," unless the facts above stated can be construed into such a perversion. The court properly charged the jury, that these incidental uses, under the evidence, constituted no ground of forfeiture.

There are other reasons upon which we could base our conclusion, but these we need not discuss.

Affirmed.

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Action on Promissory Note ; Plea of Set-Off.

1. *Refreshing memory of witness by memorandum.*—While a witness must testify to facts within his knowledge, he may, during his examination, assist or refresh his memory, by referring to an entry or memorandum made at or near the time when the facts occurred, whether made by himself or another person, if he knows it to be correct, and can, after referring to it, testify from independent recollection; and it is not necessary to show that the witness needs the memorandum to assist his memory.

2. *Same.*—The memorandum so referred to by the witness is not thereby made evidence, nor its contents disclosed to the jury, unless called for by the opposite party; and it is immaterial whether it be the original memorandum, or a copy thereof known by the witness to be correct; but, when a copy is used, and the original, being called for, is not produced, the failure to produce it, or to explain satisfactorily the reasons for using a copy, is a circumstance to be considered by the jury in weighing the testimony of the witness.

APPEAL from the Circuit Court of Coosa.

Tried before the HON. JAMES E. COBB.

This action was brought by Esselman Varner, against George W. Calloway, was commenced on the 2d April, 1883, and was founded on the defendant's promissory note for \$500, which was dated the 4th March, 1872, and payable on the 1st January, 1877. The defendant pleaded the statute of limitations, payment, and set-off; and the cause was tried on issue joined on these several pleas. "On the trial," as the bill of exceptions states, the plaintiff read in evidence the note sued on, "and testified that said note had two credits on it—one of \$102, dated March 15th, 1878; and the other for \$292, dated January 1st, 1879. The defendant, then being sworn as a witness, was proceeding to testify about different payments he had made on the note, looking at a paper he held in his hand; when plaintiff's counsel asked him, what paper he was looking at, and if he was looking at the paper to refresh his memory. Thereupon, witness swore that he was looking at a memorandum to refresh his memory about the payments he had made on the note; that he had made a memorandum in a book of each of these items and payments, at the time the payments were made; and that the memorandum which he held in his hand, and which he was looking at to refresh his memory, was an exact copy, recently made, and which he had made from the entries of payments made in said book at the time the transac-

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tions occurred. It was not shown what the entries were, except from the statements of the witness; and it was not shown that it was necessary that the witness should look at the paper to refresh his memory. The plaintiff objected to the witness looking at said paper for the purpose of refreshing his recollection;” which objection the court sustained, and the defendant excepted.

In the further progress of the trial, the testimony of the parties themselves being in conflict, as to a mule and some corn which defendant had delivered to plaintiff, and for which a credit or set-off was claimed, “plaintiff introduced M. P. Bullard as a witness, to prove the time at which said mule and corn were delivered to him by defendant; and said Bullard stated, that he could not remember the date—could not say with certainty what year it was; that he knew it was the year after he had lived with one Higgins, and could tell what year he lived with said Higgins from a memorandum-book in his pocket, which contained entries of transactions with Higgins made at the time the transactions occurred, which would show by their date the year he lived with Higgins. The defendant objected to allowing the witness to look at said memorandum-book,” and excepted to the overruling of his objections.

These two rulings of the court are now assigned as error.

L. E. PARSONS, JR., and S. J. DARBY, for appellant.

W. P. GADDIS, *contra*.

CLOPTON, J.—While the defendant was undergoing examination as a witness in his own behalf, the court refused to allow him, for the purpose of refreshing his recollection, to refer to a copy of original entries of payments on the note sued on, made by him in a book at the times the payments were severally made, which he stated was an exact copy.

Although a witness must testify to facts within his own knowledge, he may, while under examination, refer, for the purpose of assisting or refreshing his memory, to a memorandum made at or near the time of the occurrence of the facts, whether made by him, or by another, if he knows it to be correct; but, after having referred to the memorandum, he must be able to testify from independent recollection. The memorandum is not admissible in evidence, nor are its contents disclosed to the jury, unless called for by the adversary party. *Acklen v. Hickman*, 63 Ala. 494. It need not be shown that it is necessary for the witness to assist his memory by the memorandum. “The witness, by invoking the assistance of the memorandum, admits that, without such assistance, his recollec-

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tion of the transaction he testifies to, had become more or less obscured."

The distinction between the purpose to refresh the memory of the witness, and the purpose to introduce in evidence the memorandum itself, must be kept in view. When the object is to have the memorandum or entries admitted as evidence, the original must be produced, or its absence satisfactorily accounted for. But, where the purpose is merely to assist the memory of the witness, that he may thereupon testify from independent recollection, he may refer to a paper, which he knows to be a correct copy of the original. As remarked by Lord Ellenborough: "It is not the memorandum that is the evidence, but the recollection of the witness."—*Henry v. Lee*, 2 Chitty, 124.

In 1 Green. on Ev. § 436, the author observes: "It does not seem necessary that the writing should have been made by the witness himself, nor that it should be an original writing, provided, after inspecting it, he can speak to the facts from his own recollection." And in *Doe v. Perkins*, 3 T. R. 753, the case of *Tanner v. Taylor* is referred to, where a witness refreshed his memory by looking at an account, which he stated was a copy of his day-book, that he had left at home. Baron Legge said: "If he would swear positively from recollection, and the paper was only to refresh his memory, he might make use of it."

In some of the cases it has been held, that a copy should not be appealed to, even to refresh the memory, when the original can be produced. Such practice would frequently put parties to unnecessary trouble, inconvenience, and expense, and sometimes require what is impracticable. The tendency is rather to relax the rule; and the weight of authority is in favor of the doctrine, that a witness may, to refresh his recollection, use a copy of entries which he knows to be correct, if, on inspecting it, he can then testify to the facts.—*Bullock v. Hunter*, 44 Md. 416; *Harrison v. Middleton*, 11 Gratt. 527; *Marely v. Shults*, 29 N. Y. 346. The rule is subject to the limitation, that the witness must be able to testify that the original entry was, when made, a true statement of the facts, and the copy must be verified.

Where a copy is used to assist the memory, the opposite party may call for the original, to test the sufficiency and accuracy of the copy. If the original, on such call, is not produced, and satisfactory reasons are not given for the failure to produce it, and for using a copy, this circumstance may be considered by the jury in weighing his evidence.—*Chic. & Al. R. R. Co. v. Adler*, 56 Ill. 344; *Davis v. Jones*, 68 Me. 393.

The defendant should have been permitted to refresh his memory by the use of a copy of the original entries. There is

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no error in allowing the witness Bullard to assist his recollection of the year, as to which he was testifying, by referring to his memorandum-book.

Reversed and remanded.

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Special Action on the Case by Landlord, against Purchaser of Tenant's Crop with notice of Lien.

1. *Bill of exceptions; rulings on demurrer.*—A ruling on demurrer is part of the record proper, and is not matter for a bill of exceptions; and when shown only by the bill of exceptions, this court will not consider it for any purpose.

2. *Costs, in actions for torts, and appeals from magistrates.*—In an action to recover damages for a tort, if the plaintiff does not recover more than twenty dollars, he can recover no more costs than damages, in the absence of a certificate by the presiding judge that he ought to have recovered more (Code, § 3129); but this provision does not apply to actions commenced in a justice's court, and removed by appeal or *certiorari* into the Circuit Court, as to which special provision is made for the taxation or apportionment of the costs (Code, § 3124).

APPEAL from the Circuit Court of Talladega.

Tried before the Hon. LEROY F. BOX.

This action was brought by Joseph H. Keith, against William Baker, and was commenced before a justice of the peace. By the statement of the cause of action filed in the justice's court, the plaintiff claimed \$25 as damages for the defendant's alleged conversion of fifty bushels of corn, part of the crop raised by one Culpepper, on which plaintiff claimed a lien for rent. The justice rendered judgment against the plaintiff, from which the plaintiff appealed to the Circuit Court; and he there filed an amended complaint, being a special count in case. The judgment-entry only recites a trial on issue joined, and a verdict for plaintiff, for \$15; on which the court rendered judgment in his favor for that sum, with all the costs. There is a bill of exceptions in the record, which states that the defendant demurred to the amended complaint, and excepted to the overruling of his demurrer. The overruling of the demurrer, and the judgment for costs, are now assigned as error.

CECIL BROWNE, for appellant.

BOWDON & KNOX, *contra*.
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CLOPTON, J.—The record does not show any minute-entry of the judgment of the Circuit Court on the demurrer to the amended complaint. It appears only from the bill of exceptions. In such case, this court will not pass on the demurrer, nor consider the assignment of overruling it.—*Carter v. Wilson*, 61 Ala. 434; *Petty v. Dill*, 53 Ala. 641.

Section 3124 of Code 1876 makes special provision for the disposition of the costs, on appeals to the Circuit Court from the judgments of justices of the peace. It provides: "If the defendant appeals, or obtains a writ of *certiorari*, and the judgment of the Circuit Court is for less than the judgment of the justice, the court may tax either party with the costs, or both parties with any portion thereof. If the plaintiff appeals, and does not recover more than the amount for which the justice rendered judgment, he must be taxed with the costs." These special provisions leave no field, as to the taxing of the costs on appeal from the judgment of a justice of the peace, for the operation of section 3129. The two sections are in irreconcilable conflict. The latter section is penal in its character, and is intended to punish plaintiffs for bringing frivolous actions to recover damages for torts. It applies to suits brought in common-law courts of record, and has no application to a suit originating in the justice's court.

Affirmed.

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Certiorari to County Commissioners, in matter of Assessment of Taxes on Railroad Lands.

1. *When tax-year begins.*—The tax-year, so far as relates to real estate, commences on the first day of January, and the tax-payer is required to include in his schedule of property the lands owned by him on that day.

2. *Exemption of railroad lands from taxation* "for the term of eight years from May 1st, 1876;" *when term begins.*—Under the provisions of the act approved February 23d, 1876, known as the "Debt Settlement Act" (Sess. Acts 1875-6, p. 130), certain lands granted by Congress to aid in the construction of railroads, and afterwards acquired by the State under mortgages to secure its indorsement of railroad bonds, were to be disposed of, to the said railroads, or for their benefit: and it was declared that "the lands which may be acquired by the holders of the bonds mentioned in the 15th section of this act, or by the trustees hereinafter provided for the use of said bondholders under the terms of this act, shall remain exempt from taxation by this State, for the term of eight years from the first day of May, 1876." *Held*, that as the lands were not subject to taxation from January 1st to May 1st, 1876, while they were the property of the State, and as no provision was made by law for taxing

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lands acquired after January 1st, the year 1876 was not to be computed as one of the eight years during which the lands were exempt from taxation, but the term commenced with the year 1877.

APPEAL from the Circuit Court of DeKalb.

Tried before the Hon. LEROY F. BOX.

In the matter of the petition of John Swann and John A. Billups, as trustees, addressed to the Court of County Commissioners, asking that an assessment of taxes made by the county assessor of DeKalb, upon and against certain lands held by the petitioners as trustees under the provisions of the "Debt Settlement Act," for State and county taxes due for the year 1884, be vacated and set aside, as being illegal and unauthorized. The petitioners were appointed such trustees, under the provisions of said act, in February, 1877; and they claimed that, under the 17th section of said act, the railroad lands held by them were exempt from taxation for the year 1884, as a part of the eight years during which such exemption was granted and declared by that section. The petition was contested, in the name of the State, by the attorney-general, who moved to dismiss it; but the court overruled his motion, and made an order vacating and setting aside the assessment. The proceedings were then removed by *certiorari*, at the instance of the State, into the Circuit Court; and on the hearing, the facts being undisputed, that court rendered judgment vacating and setting aside the order and proceedings of the County Commissioners. From this judgment the trustees appeal, and here assign it as error.

SAMUEL F. RICE, for appellants.

THOS. N. McCLELLAN, Attorney-General, for the State.

STONE, C. J.—Certain lands in DeKalb and other counties were granted to the State of Alabama, to aid in the construction of railroads, under the act of Congress making provision therefor. The right and title to these lands had become vested in the State, under proceedings not necessary to be here described. Under the act of the legislature, known as the "Debt Settlement Act," approved February 23d, 1876—Sess. Acts, 130—provision was made for disposing of these lands to, and for the benefit of the railroads, to whose construction they had been dedicated. The title of the appellants was acquired under this statute. The 17th section of said act provides, "that the lands which may be acquired by the holders of the bonds mentioned in the fifteenth section of this act, or by the trustees hereinafter provided, for the use of said bondholders under the terms of this act, shall remain exempt from taxation by this

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State, for the term of eight years from the first day of May, 1876." The question in this case is, Should the year 1876 be computed as one of the eight years for which said lands are declared exempt from taxation? The court of County Commissioners answered this question in the negative; the Circuit Court in the affirmative.

The right of taxation is one of the attributes of sovereignty, which can not be permanently bargained away. Without it, the State can not live. Hence it is that the power and intention to tax are never subjected to the rules we apply to penal enactments. The rule is rather the opposite, and requires us to scan narrowly every asserted claim of exemptions. Liability to taxation is the rule—exemption the exception, to be proved by him who asserts it. —*Alexandria Canal & R. R. Co. v. District of Columbia*, 7 Am. & Eng. R. R. Cas. 325; *Cornwall v. Todd*, 38 Conn. 443; *Taylor v. U. S.*, 3 How. U. S. 197; *U. S. v. Hodson*, 10 Wall. 395; *Del. R. R. Tax*, 18 Wall. 206; *R. R. Co. v. Loftin*, 105 U. S. 258; *Memphis Gas Light Co. v. Taxing District*, 109 U. S. 398.

The lands, the subject of the present controversy, were clearly not liable to taxation for four months, commencing January 1st, 1876, and ending May 1st next afterwards. They were, during that interval, the property of the State; and the State does not go through the profitless and expensive ceremony of levying a tax on itself, to be paid by itself, and to itself.—Code of 1876, § 358, subd. 2. The tax-year, with us, except the assessment upon certain specified subjects of taxation, of which land is not one, commences with January 1st, and ends with December. Code, § 360. The assessor may begin the duties of assessment January 1st, in any year.—Code, § 399. The tax-payer is required to take an oath, that he will make a true return of all his taxable property, at its market value, on the first day of January preceding the assessment.—Code, § 363.

Now, all these provisions tend strongly to show that ownership of property—particularly landed property—on the first day of January, is one of the conditions of the tax-payer's liability. The oath he takes binds his conscience so far, and no farther. If, by interpretation, we hold he must render in real estate afterwards acquired, then we are forced to decide that he must render the list of part of his property under oath, and the residue without oath. And if he is required to render for assessment lands acquired from the State after the first day of January, why not require the same as to lands he acquires from private persons under like circumstances? Yet, in a transfer from individual to individual, the rule is universal and well understood, that he who owns the lands on the first day of January must pay the taxes for the current year. Our statutes have

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made no provision for assessing taxes during any year, on lands acquired after the first day of January of that year.—*The State v. Board of Revenue*, 73 Ala. 85. We think a fair test of the argument we are making, may be presented in the following supposed case: A. sells and conveys lands to B., on the first day of May, 1876. C., for a valuable consideration, binds himself to pay, and thus relieve B. from the payment of taxes for eight years. What is the beginning, and what the end of this term of years? Certainly 1876 is not one of the eight years, for A. is bound to pay the taxes of that year. The term will commence with 1877, and end with 1884. And, if this be correct, can the fact that the State makes the sale work any difference!—*State v. Williamson*, 33 N. J. Law, 77; *McLaren v. Sheble*, 45 Miss. 130; Hilliard on Taxation, 171.

We have found but a single case—*State, ex rel. v. Certain Lands*, 40 Ark. 34—which seems to have considered this question. The decision in that case is seemingly made to turn on statute law, which we do not find in our library. The report of the case does not enable us to determine what are their statutory provisions. If they are similar to ours, we decline to follow what seems to be the ruling in that case.

Our statute (Code, § 360) makes provision, that “property brought into the State since the first day of January, and before the assessor has completed his assessment, shall be subject to taxation the same as if it had been held and owned in the State on the first day of January.” This, it is contended, furnishes an analogy for taxing the lands brought to view in this record. We think the tendency of the argument is in the opposite direction. The statutory provision certainly shows two things: first, that ownership on the first day of January, as a general rule, is the test of liability to taxation; and, second, that the attention of the legislature was directed to the subject of property brought under the jurisdiction of the taxing power *after* the first day of January. They provided for taxing one class of personal property—that brought into the State after the first day of January—and did not provide for taxing any other acquisition during the year. That there may be many other mode of acquiring property, and many other methods of increasing its taxable value, no one need be told. They are not provided for. *Inclusio unius est exclusio alterius*.

The judgment of the Circuit Court is reversed and annulled, and the judgment and decree of the court of County Commissioners reinstated.

{McCalley v. Wilburn & Co.}

McCalley v. Wilburn & Co.*Petition for Supersedeas of Execution on Injunction Bond.*

1. *Promissory note of administrator, for debt of estate; when binding on him personally.*—When an administrator executes a promissory note, under authority granted by an order of the Probate Court (Code, § 2432), for the purpose of settling or extending a debt of the estate, the note imposes no personal liability upon him; but, if the proceedings are substantially defective, and, by reason thereof, the note is not binding on the estate, the general rule applies which governs the contracts of trustees and agents, and the note imposes a personal liability on the administrator.

2. *Judgment by nil dicit; conclusiveness of.*—A judgment by *nil dicit*, in an action on a promissory note, is conclusive as to all personal defenses which might have been urged against it, and precludes the defendant from denying that he owes plaintiff the amount thereby adjudged.

3. *Form of judgment against administrator.*—Where the defendant is described, in the summons and complaint, as “W. J. M., administrator of M. A. M.,” and in the margin of the judgment-entry as “W. J. M., adm^r of M. A. M.,” while the judgment, by *nil dicit*, is, that the plaintiff “have and recover of the defendant” the amount specified, “to be levied of the goods and chattels of his said intestate in his hands to be administered;” the judgment is against the defendant personally, and the superadded words will be rejected as surplusage, or regarded as a clerical misprision.

4. *Injunction bond; summary execution on.*—When an injunction is sued out by the heirs of a decedent, to enjoin proceedings under an execution issued on a judgment against the administrator, which has been levied on their lands; the injunction bond being payable and conditioned as required by the statute, and duly certified by the register on the dissolution of the injunction (Code, §§ 3870-76); execution may be thereon issued against the obligors, for the amount of the judgment, with interest and damages; and they can not supersede it because the judgment is held void as against the decedent’s estate.

APPEAL from the Circuit Court of Madison.

Tried before the Hon. H. C. SPEAKE.

This was a petition by Archie McCalley, James R. McCalley, and Charles S. McCalley, to supersede and quash an execution, which had been issued by the clerk of said court, in favor of George W. Wilburn & Co., against the petitioners and one Thomas S. McCalley, and which was founded on an injunction bond executed by them. The injunction bond was dated September 2d, 1875, and payable to the register in chancery at Huntsville; and after reciting that said Archie and James R. McCalley “have filed their bill of complaint in said Chancery Court, against Geo. W. Wilburn & Co., R. E. Murphy, sheriff

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of said county, and others, as defendants," and by their said bill "have prayed and obtained an order for an injunction, restraining and enjoining the said Wilburn & Co. from further prosecuting their suit, and also restraining and enjoining said Murphy as sheriff from further proceeding under said execution against said property in said bill described," was conditioned as follows: "Now, therefore, the condition of the above obligation is such, that if the said Archie McCalley and James R. McCalley, executors, administrators, or any of them, shall and do well and truly pay, or cause to be paid, the amount of the judgment herein enjoined, with interest, and such damages and costs as may be decreed against such party, if the same is dissolved, then this obligation to be void," &c.

Said injunction bond was given, in accordance with a *fiat* granted by a circuit judge, under a bill filed by said Archie and James R. McCalley, the prayer of which, as set out in the petition for a *supersedeas*, was, "that said George W. Wilburn & Co. be enjoined from further prosecuting their said suit, and that said judgment be annulled, set aside, and held for nought; and that said Murphy, as sheriff, be enjoined from proceeding under said execution against said property," and for other and further relief. The judgment sought to be enjoined was rendered on the 19th June, 1875, and was in these words: "Came the parties," &c., "and the defendant withdraws his pleas by him heretofore pleaded, and now says nothing in answer to the plaintiffs' complaint. It is therefore considered by the court, that the plaintiffs have and recover judgment against the defendant, for \$825.33, damages by the said plaintiffs sustained, together with the costs in this behalf expended; to be levied of the goods and chattels of his said intestate, in his hands to be administered." In the marginal statement of the parties' names, in the judgment-entry, the defendant was described as "William J. McCalley, adm'r M. A. McCalley, deceased;" and in the summons, as "William J. McCalley, administrator of Martha Ann McCalley;" while, in the complaint, the plaintiffs claimed "of the defendant the sum of \$753.97, due by promissory note executed March 30th, 1874, by the defendant as administrator of said Martha Ann McCalley, pursuant to an order of the Probate Court of said county," &c. An execution on this judgment having been levied on lands belonging to the estate of Mrs. McCalley, the bill was filed by the complainants, her children and heirs, insisting that the order of the Probate Court was a nullity, and that the judgment was not binding on the lands or estate of Mrs. McCalley. On appeal to this court, it was held that the bill was wanting in equity, because it did not contain the allegations necessary to show that the Probate Court had jurisdiction; and

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the cause was remanded, in order that an amendment might be asked and made.—See the case reported in 63 Ala. 436-48. After the remandment of the cause, the bill was amended, by setting out the order of the Probate Court, and the petition on which it was founded; but the chancellor, holding that the amendment did not give equity to the bill under the decision of this court, rendered a decree dismissing the bill, and dissolving the injunction. A copy of this decree, and of the injunction bond, being duly certified by the register to the clerk of the Circuit Court, the latter thereupon issued the execution against the obligors which they now seek to quash and supersede.

On the hearing, the court dismissed and disallowed the petition; and its judgment, to which the petitioners excepted, is now assigned as error.

R. C. BRICKELL, and HUMES, GORDON & SHEFFEY, for appellants, contended that a summary execution could not be issued against the obligors in the bond, because they were strangers to the judgment, and only sought to enjoin proceedings under the execution against their property, leaving the judgment in force against the defendant; that the plaintiffs' remedy against them was by action on the bond. They cited *Dunn v. Bank of Mobile*, 2 Ala. 152; *Bartlett v. Gayle*, 6 Ala. 305; *Thomas v. Brashear*, 4 Monroe, T. B. 65; *Moore v. Hallum*, 1 Lea, Tenn. 511; *Carlin v. Hudson*, 12 Texas, 202; *Scarlett v. Hicks*, 13 Fla. 314; *Hanley v. Wallace*, 3 B. Mon. 184; High on Injunctions, § 1623; Hilliard on Injunctions, 129, § 155.

JNO. D. BRANDON, D. D. SHELBY, and CABANISS & WARD, *contra*.

SOMERVILLE, J.—In *Wilburn & Co. v. McCalley*, 63 Ala. 436—the title under which this cause was last before us on appeal—it was decided that the proceedings of the Probate Court, which authorized the execution of the note given by W. J. McCalley, as the administrator of his wife's estate, were void for want of conformity to the statute, and, for this jurisdictional defect, neither the note itself, nor the judgment to which it was reduced by suit, was binding upon the estate of the decedent. That case, however, is no authority for the assumption, that the note did not impose a personal liability upon McCalley, as its maker. If his petition to the Probate Court had contained all the requisite jurisdictional allegations, and the order of the court based on the petition had been otherwise regular, it is very clear that the obligation given by

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the administrator would have been binding on him only in his representative capacity, and he would not have been in any wise personally liable. Such is the express declaration of the statute. But this is the case only where the proceedings of the court are valid, so as to confer upon the administrator the legal authority to bind the estate by the execution of "such note, bond, or bill."—Code, 1876, § 2432. It is obvious that an administrator can not shield himself from personal liability, by refuge under an order which is absolutely void. The rule of law which governs his liability is analogous to that governing trustees and agents in general. Where he undertakes to bind the estate, and fails to do so for want of authority, he binds himself personally, and may be sued upon his contract individually.—*Whitesides v. Jennings*, 19 Ala. 784. And in such cases, it avails him nothing, that he intended only to bind himself in his representative capacity.—*Thatcher v. Densmore*, 5 Mass. 595; *Vann v. Vann, ex'r*, 71 Ala. 154. However this may be, the judgment rendered in the Circuit Court of Madison county on June 19, 1875, against McCalley, in favor of Wilburn & Co., was conclusive of all defenses which might have been urged against the note prior to the rendition of such judgment. The suffering of judgment *nil dicit* by the defendant precludes him from now denying that he owes the plaintiffs the money adjudged by a court of competent jurisdiction to be due them.—*Mervine v. Parker*, 18 Ala. 241; *McDonald v. Mobile Life Ins. Co.*, 65 Ala. 358; Freeman on Judg. § 435. This judgment is rendered against the defendant, McCalley, personally, and not against him in his representative capacity. The affix of the word "*adm'r*," in the margin, is, at most, a mere *descriptio personæ*; and the concluding phrase—"to be levied of the goods and chattels of said intestate, in his hands to be administered"—is mere surplusage, capable of rejection by amendment as a clerical misprision. It can not, therefore, affect the binding force of the judgment on the defendant in his personal or individual capacity.

We can see no good reason whatever for the contention, that the injunction bond given by the appellants is not a statutory bond. It is executed in double the amount of the judgment sought to be enjoined, with proper security, being payable to, and approved by the register, and is also conditioned, on the dissolution of such injunction, to pay the amount of the judgment enjoined, with interest, and such damage and costs as may be decreed against the party at whose application the writ was granted.—Code, 1876, § 3869. The suggestion, that the purpose and legal effect of the writ was not to enjoin the judgment, but only to prevent the sale under it of a particular piece of landed estate, is refuted by the entire chancery pro-

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ceedings upon which the injunction was based, as we find them fully set out in the record.

The bond being one to "enjoin proceedings at law on a judgment for money," in view of the dissolution of the injunction, has impressed upon it, by express provision of the statute, "the force and effect of a judgment;" and having been certified by the register, to the clerk of the court in which the judgment was rendered, execution was properly issued against the appellants, as obligors, for the amount of such judgment which had been enjoined, with interest and damages.—Code, § 3876.

The judgment of the Circuit Court, quashing the petition for *supersedeas* filed by appellants, and dismissing the same, is free from error, and must be affirmed.

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Bill in Equity for Foreclosure of Mortgage, given by Executors and Devisees for Debt of Testator.

1. *Authority of executor or administrator to bind estate.*—Without express power, an executor or administrator can not, by any act or contract, create a charge or liability against the decedent's estate; nor can he, by any payment, promise or admission, suspend or remove the bar of the statute of limitations, so far as it affects a charge on lands, descended or devised; nor waive, or in any manner displace, the bar of the statute of non-claim.

2. *Non-claim as defense; averment of presentment.*—When the bill seeks to enforce against a decedent's estate a claim which is, *prima facie*, within the bar of the statute of non-claim (Code, § 2597), and fails to aver the due presentment of the claim, or facts excepting it from the operation of the statute, it is subject to demurrer; and an averment of an admission by the personal representative, of such presentment, is not the equivalent of an averment of the fact itself.

3. *Same.*—When the purpose of the bill is to enforce, not the original debt or claim against the decedent's estate, but a subsequent promise by the heirs or devisees, founded on a valid claim against their ancestor, and a lien created by them for its payment or performance, the bar of the statute of non-claim comes collaterally in question, as affecting the consideration of the subsequent promise, and it is not necessary that the bill should aver presentment.

4. *Foreclosure of mortgage; what defenses are available.*—Against a bill to enforce or foreclose a mortgage, any defense may be set up which would be available at law, in an action on the secured debt, except the statute of limitations.

5. *Same; want of consideration as defense, and how taken.*—When a bill to consideration is shown by the averments of the bill, or by the recitals of the mortgage, which is made an exhibit to the bill, the defense may be taken by demurrer, or by motion to dismiss for want of equity;

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but, in other cases, it must be taken by plea or answer; and the recitals of the mortgage, as to the consideration, may be contradicted by parol evidence.

6. *Admission by executor, as to presentment of claim.*—In the matter of the presentation of claims against the estate, the executor represents the whole estate; and his admissions of due presentment, while he is acting as executor, whether made before or after the expiration of the period allowed for presentment, is evidence of the fact, which is not impaired by his subsequent resignation.

7. *Admission of subsisting debt; effect in avoiding bar of statutes of non-claim and limitations.*—An admission that a claim is a subsisting debt, necessarily implies its due presentment, which would avoid the bar of the statute of non-claim; but not of the statute of limitations (Code, § 3240), which requires a partial payment before the bar is complete, or an unconditional promise in writing signed by the party to be charged thereby.

8. *Subsequent promise to pay debt already barred.*—A debt which is barred by the statute of limitations, is a sufficient consideration to support a subsequent promise to pay it, if such promise is expressed as required by the statute; and a debt of the ancestor, which is a charge on his lands, though barred by the statute of limitations, will support a subsequent promise to pay by the heirs or devisees.

9. *Consideration of mortgage; sufficiency of recitals, on demurrer.*—A recital of “ten dollars in hand paid,” as the consideration of a mortgage, is sufficient to sustain it on demurrer for want of consideration, in the absence of all other evidence.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. N. S. GRAHAM.

The bill in this case was filed on the 27th November, 1882, by John Grimball, as the administrator of the estate of his deceased wife, Mrs. Kate Moore Grimball, against James H. Mastin and others, as the executors of the last will and testament of Alexander Erskine, deceased, with the children and grand-children of said testator, who were interested in his estate as heirs and devisees; and sought, principally, to enforce and foreclose a mortgage on certain lands, executed by said executors and some of the devisees, at least against their respective interests in the testator's estate, as hereinafter more particularly stated. The mortgage, a copy of which was made an exhibit to the bill, contained the following recitals and provisions:

“Whereas the undersigned are the executors, devisees and legatees of the estate of Alexander Erskine, deceased; and whereas he was indebted at the time of his death for the debt secured by this mortgage, as security, with James J. Donegan, for Michael Erskine, and received indemnity therefor, in a mortgage from said Michael upon certain lands in the State of Texas; and whereas, after the death of said Alexander, in order for his estate to foreclose said mortgage, it was necessary that it should furnish evidence of the payment of said debt by it; and whereas the undersigned James H. Mastin, who was made one of the executors of said Alexander's estate by his last will

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and testament, and duly qualified as such, in order to foreclose said mortgage for the benefit of said testator's estate, gave his individual note for said debt, with said James J. Donegan, which note reads as follows," setting it out ; "*and whereas* said mortgage was foreclosed, and the estate of said Alexander got the benefit accruing therefrom secured thereby to said Alexander's estate ; *and whereas* said Alexander's estate justly owes said debt, and we and each of us, as the executors, legatees and devisees thereof, do hereby acknowledge its liability therefor, and promise to pay the same, said legatees and devisees limiting their liability to the extent of their interest in said Alexander's estate ; *and whereas* said debt is now the property of Samuel R. Cruse, as trustee of the estate of Mrs. Kate Grimball, deceased ; *and whereas* various amounts have been paid on said note, as evidenced by the indorsements thereon, as follows," copying them ; "*and whereas* the undersigned desire to secure the payment therefor, as said Cruse is, as such trustee, required to have it secured by the order of the Chancery Court of Madison county, Alabama : *Now, in consideration of the premises, and the sum of ten dollars to us in hand paid* by said Cruse, the receipt whereof is hereby acknowledged, we, the undersigned," naming them, "do hereby grant, bargain, sell, alien, enfeoff and convey unto Samuel R. Cruse, as trustee of the trust estate of Mrs. Kate Grimball, deceased, the following described tracts or parcels of land ;" "to have and to hold unto the said Cruse as such trustee, and his successors in office, forever, with general warranty of title ; upon condition, nevertheless, that if said debt is not paid within three years from the date of this mortgage," then the mortgagee may take possession and sell.

The note of said Mastin and Donegan, as copied in the mortgage, was for \$8,369, was dated April 18th, 1867, payable one day after date to R. W. Walker as trustee (who was the predecessor of said Cruse), with interest from date, payable annually ; and purported to be given for value received. The bill alleged the facts as recited in the mortgage, and further, that Donegan, who was also jointly bound for the debt, had since departed this life, leaving no assets, and no relief was prayed as against his estate ; that said Alexander Erskine, the testator, died in July, 1857 ; that by his last will and testament, which was duly probated, and letters testamentary granted to the persons therein named as executors, his entire estate was charged with the payment of his debts, and his executors were required to keep his estate together, "so long as they might deem it advisable, or for the benefit of his devisees ;" that the executors have kept the estate together, except in the matter of some small sales of property, and have held possession of the lands, "charged by the

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will with the payment of said debts ;" that said note of Mastin and Donegan " was not given, nor accepted, as payment of said debt, but only as collateral security, and the liability and indebtedness of said estate, in respect to said debt, was fully recognized and acknowledged as late as November, 1879, by all the executors of said estate, by the widow, and by all the living children, and by said James H. Mastin, both individually and as trustee ;" that the estate owes no other debt, except the expenses of administration ; that there is other property, real and personal, in the hands of the executors, not included in said mortgage, of the value of nearly \$10,000 ; and that the executors have filed a bill in said Chancery Court, for a settlement of their administration and the distribution of the estate.

The prayer of the bill was expressed in these words : "Complainant prays that said estate may be charged with the payment of the said debt due complainant, *in solido* ; that this hon. court will take charge of the further administration and final settlement of said estate, for the purposes of the payment of said debt ; that for the purpose of the ascertainment of the interest and share of each of said mortgagors in the estate of said Alexander Erskine, deceased, in the event your honor should hold that said estate is not liable for said debt, your honor will ascertain the value of the share of each of said mortgagors in the property mortgaged as aforesaid, that the same may be subjected to the payment of the debt secured in the said mortgage ; that in the event any of said mortgagors shall be found to have obtained from the said estate any larger sums of money or property than others, in that event, that the heirs who may be found to be creditors of such mortgagors, in the settlement of said estate may be required to settle such balance as may be found due them, from other property belonging to said estate ; that said mortgage may be foreclosed, and said lands therein conveyed sold for cash, and the proceeds of the same applied to the payment of the debt secured by the same ; and, in the event the proceeds of said sale shall not fully pay off and discharge the said debt, that a decree may be rendered against said executors for any balance that may remain unpaid, to be paid out of the assets of the estate of said Alexander Erskine."

A demurrer to the bill was filed by all of the defendants jointly, assigning the following as grounds of demurrer : 1st, that the executors had no authority, under the testator's will, to execute said mortgage ; 2d, that said Mastin, as executor, and Mrs. Erskine as trustee for Catharine and James A. Erskine, had no power under the will, or otherwise, to execute said mortgage ; 3d, "that said mortgage is without consideration, and therefore not an obligation enforceable against these defendants ;" 4th, "that the bill does not show that the debt existing

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against said Alexander Erskine and James J. Donegan was presented to the executors of said Erskine with eighteen months after the grant of their letters testamentary ;" 5th, " that said bill shows on its face that all the devisees and legatees under the will of said Erskine did not join in the execution of said mortgage ;" 6th, " that the prayer of the bill is, *inter alia*, that the share of each mortgagor in said estate may be ascertained, and subjected for said debt, while the allegations of the bill show that the devisees only mortgaged their interest as devisees under the will of said Alexander Erskine, and not their shares as distributees of the estate of John H. Erskine, deceased, a devisee who did not join in the execution of the mortgage."

The chancellor sustained the demurrer, citing the following authorities: *Fretwell v. McLemore*, 52 Ala. 124; *Taylor v. Robinson*, 69 Ala. 269; *McDonnell v. Jones*, 58 Ala. 25; *Colvin v. Owens*, 22 Ala. 795; *Vanderver v. Ware*, 65 Ala. 606; *Starke v. Wilson*, 65 Ala. 580; *Teague v. Corbitt*, 57 Ala. 529; *Townes v. Ferguson*, 20 Ala. 147. The complainant appeals from this decree, and here assigns it as error.

CABANISS & WARD, and R. C. BRICKELL, for the appellants. (1.) The appellants admit the authority of the cases cited by the chancellor, to which others might be added, but deny that those cases are applicable to this. The mortgage recites the existence of the debt, and acknowledges its justness; and all the mortgagors, personal representatives and devisees, join in an unconditional promise to pay it. These recitals, the truth of which are admitted by the demurrer, are the equivalent of a positive and unequivocal admission and declaration that the debt against the estate exists—that it has been duly presented, and that it has not been paid or extinguished. In the matter of the presentation of claims, the executor or administrator represents the whole estate; and his admission of the fact of presentment, whether made before or after the expiration of eighteen months, is evidence of the fact as against all the parties interested in the estate.—*Pharis v. Leachman*, 20 Ala. 678; *Starke v. Keenan*, 5 Ala. 590; *Darrington v. Borland*, 3 Porter, 39. In addition to these recitals, the mortgage shows a transaction between the parties which is only reconcilable with the due presentment and continued existence of the debt—that is, the surrender of the evidence of the original debt, and the execution of a new note by Donegan and Mastin, in order that indemnity might be secured from the principal debtor. If the estate was not liable for the debt—if it was not a valid and existing obligation against the estate—there was no reason or necessity for indemnity, and no liability against which indemnity was required. The case made by the bill, then, not

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being *prima facie* within the bar of the statute of non-claim, it was not necessary to aver a presentment of the demand.

(2.) The same acts and admissions are equally effectual to show that the debt was not barred by the statute of limitations; and even if the statute had operated a bar, the unconditional promise of payment contained in the mortgage avoids it.—*Merrills v. Swift*, 18 Conn. 257; *Balch v. Onion*, 4 Cush. Mass. 559; *Palmer v. Butler*, 36 Iowa, 576. Nor is the statute of limitations, though barring an action on the debt, a defense against a bill for the foreclosure of a mortgage given to secure it. *Inge v. Brandon*, 2 Ala. 331; *Locke v. Palmer*, 26 Ala. 312; *Ware v. Curry*, 67 Ala. 274; Wood on Limitations, 448-51.

(3.) On the recitals of the mortgage, it is supported by a sufficient consideration.—*Bolling v. Munchus*, 65 Ala. 561; *Lawrence v. McCalmont*, 2 How. U. S. 426.

HUMES, GORDON & SHEFFEY, R. W. WALKER, and D. D. SHELBY, *contra*.—(1.) The contracts of executors and administrators, even when relating to matters necessary to the execution of their trust, are only binding on them personally, and do not create any liability against the estate.—*Vanderveer v. Ware*, 65 Ala. 606, and 69 Ala. 38; *Vann v. Vann*, 71 Ala. 154; *Steele v. Steele*, 64 Ala. 438; *Maybury v. Grady*, 67 Ala. 148; *Daily v. Daily*, 66 Ala. 266; *Foxworth v. White*, 72 Ala. 224.

(2.) The mortgage is without consideration. If a person accedes as surety to an existing agreement, or guarantees an existing debt, for which there was a sufficient consideration as between the plaintiff and a third person, something new must take place, of the nature of a detriment to the creditor, or a benefit to the debtor or surety, to form a consideration for the engagement of latter.—*Jackson v. Jackson*, 7 Ala. 791; *Thomason v. Dill*, 30 Ala. 444; Browne on Stat. Frauds, 412, § 395; *Morley v. Boothby*, 3 Bing. 107-13; Story on Prom. Notes, §§ 457-8, note 2; *University v. Livingston*, 57 Iowa, 307, or 42 Amer. Rep. 42; *Cottage v. Kendall*, 121 Mass. 528, or 23 Amer. Rep. 286; *Exchange Bank v. Rice*, 107 Mass. 37; *Stewart v. Trustees*, 2 Denio, 403, and 1 N. Y. 581; *Limerick v. Davis*, 11 Mass. 113. A mortgage is but a security for a debt, and is without consideration when no debt exists.—*West v. Hendrix*, 28 Ala. 226; *Agee v. Steele*, 8 Ala. 948; *Prater v. Miller*, 25 Ala. 320; *Stewart v. Bradford*, 26 Ala. 410. (3.) The bill seeks to charge the estate with a debt of the testator, and does not aver a presentment of the demand to the personal representatives within the period prescribed by law, nor state facts which excuse the failure to present it.—*Fretwell v. McLemore*, 52 Ala. 124; *McDowell v. Jones*, 58 Ala. 25; *Jones v. Lightfoot*, 10 Ala. 17; *Br. Bank v. Hawkins*, 12 Ala. 755; *Owen v.*

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Corbitt, 57 Ala. 92; *Taylor v. Robinson*, 69 Ala. 269; *Foster v. Holland*, 56 Ala. 474.

CLOPTON, J.—A legal representative can not, without express power, by any act or contract, create a charge or liability against the estate he represents; nor can he, by payment, promise, or admission, suspend the operation of the statute of limitations, or remove its bar, so as to keep alive or revive a charge on lands descended or devised; nor waive, or in any manner displace, the bar of the statute of non-claim. These general propositions are not controverted. The contestation is as to their applicability to those defendants who joined in the execution of the mortgage, and to the aspect of the bill wherein it seeks to enforce the lien on their interests in the mortgaged lands.

It may be regarded as settled, that a bill in equity, for the enforcement of a claim against the estate of a decedent, is subject to demurrer, if the claim is *prima facie* within the bar of the statute of non-claim, and there is an omission to aver its presentation within the time prescribed by the statute, or sufficient cause for excepting it from the operation of the statute.—*Fretwell v. McLemore*, 52 Ala. 92; *Foster v. Holland*, 56 Ala. 474; *Williams v. Auerbach*, 57 Ala. 90. An admission of the personal representative may be evidence tending to show presentation; but an averment of the admission—of evidence—is not the averment of the distinct fact of presentation of the claim. An explicit and positive statement of the *fact*, on which a material issue may be formed, is required. The bill fails to aver the presentment of the claim against the estate of the testator, or any cause for excepting it from the operation of the statute; and is defective as to the defendants who did not join in the mortgage.

The rule applies only when the bill is brought to condemn to the satisfaction of the demand assets in the hands of the legal representative for administration, or lands descended or devised. When the purpose of the bill is to enforce a subsequent promise or contract of the devisees or heirs, founded on the validity of a claim against their testator or intestate, and a lien created by them as security for its performance, the bar of the statute of non-claim comes collaterally into question, and an averment of a presentation of the claim is not requisite. In such case, the question of the bar of the claim by either the statute of limitations, or of non-claim, is important only as the claim may enter into and constitute the consideration of the subsequent promise or contract.

Against a bill to foreclose a mortgage, any defense, other than the statute of limitations, may be set up, which will avail

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in an action at law on the debt. If the defense be a want of consideration, the recitals of the mortgage are open to inquiry, and parol evidence is admissible. When the bill and mortgage are silent as to the particular consideration, the defense must be made by plea or answer; but, when the want of consideration appears from the bill, either by the averments proper, or by the recitals of the mortgage, it having been made an exhibit, the objection may be taken advantage of by demurrer, or motion to dismiss for want of equity.

The mortgage was executed by the executors and some of the devisees, and recites, substantially, that their testator was, at the time of his death, indebted as surety for Michael Erskine, and had taken a mortgage on lands in Texas for his indemnity; that, in order to foreclose the mortgage, it was necessary to furnish evidence of the payment of the debt, and for this purpose one of the executors and Donegan, who was a co-surety with the testator, gave their note for the debt: that the mortgage on the lands in Texas was foreclosed, and the estate of the testator received the benefit thereof; and that the mortgagors desired to secure the payment of the debt, as the then trustee of the complainant's intestate had been required, by the order of the Chancery Court, to have it secured. The mortgage recites the justness of the debt, acknowledges the liability of the testator's estate, and the mortgagors' promise to pay the same,—the devisees limiting their liability to the extent of their interests in the estate. The question, on this demurrer, is, does it appear from these recitals that the mortgage is unsupported by a sufficient consideration.

In the matter of the presentation of claims, the executor represents the whole estate; and his acknowledgment that a claim was presented within the time required by statute is evidence of the fact, which is not impaired by his subsequent resignation.—*Starke v. Keenan*, 5 Ala. 590. The admission is of equal value as evidence, whether made before or after the expiration of the time for presentment, if he was the acting executor when it was made. In *Pharis v. Leachman*, 20 Ala. 662, it was said: "The admissions of the administrator, Leachman, made by him during the continuance of his representative character, although after the expiration of the eighteen months from the grant of letters, are evidence of the fact of presentation; and if they are to be regarded as evidence of this fact against the administrator, they are equally evidence of the same fact against the other parties. The admissions of the personal representative, which will take the debt out of the statute of limitations, do not bind the heir; for the reason, that the one represents the personal, and the other the real estate; and the admission of the administrator, operating only on the estate

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which he represents, is as to the heir an act *inter alios*. But, in relation to the presentation of claims, the administrator represents the whose estate." It is true, there is no direct admission, or acknowledgment, that the claim was presented; but the recitals of the mortgage contain admissions that the demand is a subsisting debt, and acknowledge the present liability of the estate. These admissions are untrue, if the debt was barred by the statute of non-claim, or were made in ignorance of the operation of the statute; for by the bar it was *extinguished*. We are not authorized, on demurrer, to presume either of these alternatives. We must treat the admissions as true; and so considering them, must regard the debt as an existing and enforceable liability of the estate, so far as its validity is affected by the statute of non-claim. To destroy its efficacy, as an element of consideration for the subsequent promise, the claim must have been barred; and on demurrer for want of consideration, this fact should appear from the bill, at least by reasonable implication. No such implication can arise, in opposition to admissions inconsistent with its existence; and no presumption in favor of a want of consideration will be indulged, against the positive recitals of the mortgage. We do not mean to intimate that the admissions are conclusive, or any opinion as to the effect on the sufficiency of the consideration of the mortgage, if the claim was really barred. All we decide is, that it not appearing that the debt was within the bar of the statute, the want of consideration, so far as it rests on the extinguishment of the claim, does not appear from the bill.

With respect to the bar of the statute of limitations, the admissions do not have the same operation. No act, promise, or acknowledgment, is sufficient to remove the bar of the statute, or is evidence of a new continuing contract, except a partial payment made upon the contract, by the party sought to be charged, before the bar is complete, or an unconditional promise in writing, signed by the party to be charged thereby.—Code, § 3240. The bill does not aver, nor do the recitals of the mortgage contain, any admission of a partial payment before the bar was complete, or of any promise in writing *previous* to the execution of the mortgage, made or signed by the devisees. The bar of the statute of limitations does not extinguish the *debt*, only the remedy. The admissions of the mortgage are not irreconcilable with the existence of such bar. A debt may be barred by limitation, and still be, in the larger legal sense, a subsisting debt.

But, a claim barred by the statute of limitations may be a sufficient consideration for a promise to pay it, if such promise be expressed as required by statute. In 1 Pars. on Contracts, 434, the rule is stated as follows: "A moral obligation to pay

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money, or to perform a duty, is a good consideration for a promise to do so, when there was originally an obligation to pay the money, or to do the duty, which was enforceable at law but for the interference of some rule of law. Thus, a promise to pay a debt contracted during infancy, or barred by the statute of limitations, or bankruptcy, is good, without other consideration than the previous legal obligation." A mere moral obligation is not sufficient—there must have been a valuable consideration creating a pre-existing duty or obligation, barred by some positive rule of law.—*Vance v. Wells*, 6 Ala. 737; *Turlington v. Slaughter*, 54 Ala. 195; *Wolffe v. Eberlin*, 74 Ala. 99.

It is not necessary that there should have been a prior legal obligation on *the promisor*, which could have been enforced against him at law. In *Vance v. Wells*, 8 Ala. 399, it was held, that a note signed by a married woman, who had a separate estate, for goods furnished, created a moral obligation to pay the debt, which could be enforced at law, upon her subsequent promise after coverture ceased. The debt due by the testator was a statutory charge on the lands devised, and was enforceable, in a proper case, by proper legal proceedings. The effect of the statute is to bind the lands for the payment of all debts, to the same extent that debts by specialty bound real assets in England.—*Lightfoot v. Lightfoot*, 27 Ala. 351. Taking an estate subject to a debt or charge, is a sufficient consideration for a promise to pay the debt. When the devisees took the devised lands, they took them subject to the debts of the testator. There was created a moral obligation to pay the debt due by the testator, and a charge on the lands for its payment, which was enforceable before the remedy was barred by the statute of limitations. Had the devisees made a promise in writing to pay the debt, and executed a mortgage to secure its performance, before the bar of the statute was complete, there would have been no question of the sufficiency of the consideration. The statute of limitations is a defense personal to them, which they may set up or waive. By the execution of the mortgage, the defense was waived. When there is a waiver of the bar, the mortgage has the same force and effect as if it had been executed before the bar was complete. In so holding, we have assumed as true the averment of the bill that the note of Mastin and Donegan was given as collateral security for, and not in payment of the debt.

In *Bolling v. Munchus*, 65 Ala. 558, it was observed: "We may pass over all other considerations recited in the mortgage, than that of one dollar, the receipt of which is acknowledged by the mortgagor. It is an elementary principle of the law of contracts, applicable to every form of contracts, and in all

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courts, that if a consideration is *valuable*, it need not be *adequate*. There can be no inquiry into, and no adjustment of the value of the consideration, in the absence of duress, or of fraud, or of some confidential relation existing between the parties. . . . The law is satisfied, whenever there is a valuable consideration, supporting an executory contract the promisor is required to perform. And if there be no fraud, or imposition, the least consideration will support a contract deliberately made, with full knowledge of all the circumstances." In support of this, *Lawrence v. McCalmont*, 2 How. 426, is cited, where it was held that an expressed consideration of one dollar paid was sufficient to support a guaranty of £10,000. There can be no doubt that any valuable consideration, however small, will support an executory contract; but it must be a consideration *really* paid, or agreed to be paid, not nominal or fictitious—understood by the parties to be the consideration, or a part. The mortgage recites a consideration of "*the sum of ten dollars to us in hand paid*," and acknowledges its receipt. *Prima facie*, the recital shows a valuable and real consideration, and its actual payment. In the absence of opposing proof, the consideration would be held sufficient to support the mortgage, and we must so hold on demurrer for want of consideration.

The bill is inartificially drawn—not sufficiently certain and explicit in some averments, and defective in some other respects. These may be remedied by amendment. We have considered only the causes of demurrer assigned.

It results, that the demurrer should have been sustained, as to the defendants who did not join in the mortgage, and overruled as to the others.

Reversed and remanded.

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Bill in Equity for Cancellation of Mortgage, or Redemption.

1. *Wife as party to bill filed by her trustee; amendment as to parties.* The wife is a proper party to a bill filed by her testamentary trustee, which seeks to set aside and cancel a mortgage of her property executed by her and her husband to secure a recited indebtedness; and if she is joined as a defendant with her husband and the mortgagees, her name may be struck out by amendment, and she may then be made a complainant with the trustee.

2. *Filing bill in double aspect, asking cancellation of mortgage, or redemption under it.*—A bill can not pray to have a mortgage set aside and cancelled, as inoperative and void, or, in the alternative, for an account

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and redemption under it; and if the original bill prays the former relief only, an amendment asking the other, in the alternative, can not be allowed.

3. *Tender in bill to redeem.*—In a bill to redeem under a mortgage, it is always necessary to tender the amount due, unless it is averred that nothing is in fact due; and the only safe plan is to tender what may be found due, even when averring that nothing is due.

APPEAL from the Chancery Court of Macon.

Heard before the Hon. N. S. GRAHAM.

The original bill in this case was filed on the 19th November, 1881, by John H. Walker, as testamentary trustee of Mrs. Eliza W. Tatum, under the will of their deceased father, against Mrs. Tatum and her husband, Meniffee Tatum, and against the persons composing the mercantile firm of Tatum Brothers; and sought to set aside and cancel, as void and inoperative, a mortgage and crop-lien executed by Mrs. Tatum and her husband to said Tatum Brothers, and to enjoin an action at law which the latter had instituted to recover the land conveyed by the instrument. An amended bill was afterwards filed, striking out the name of Mrs. Tatum as a defendant, and making her a complainant with the trustee; and also praying, in the alternative, an account and redemption under the mortgage. The chancellor overruled a demurrer to the bill as amended; and on final hearing on pleadings and proof, the account stated by the register showing that the mortgage debt was overpaid, he rendered a decree ordering satisfaction of the mortgage to be entered, and a personal decree against said Tatum Brothers, in favor of Mr. Tatum, for the over-payment. Each of the decrees is now assigned as error.

J. D. GARDNER, and W. C. BREWER, for appellants.

W. H. PARKS, R. H. ABERCROMBIE, and J. A. BILBRO, *contra*.

STONE, C. J.—The original bill in this cause was filed by John H. Walker, as trustee of Mrs. Eliza W. Tatum, then the wife, now the widow of Meniffee Tatum. P. A. Tatum, Henry D. Tatum, Meniffee Tatum, and Eliza W., his wife, were made defendants. The controlling purpose of the bill was to have declared inoperative and void an alleged crop-lien and mortgage, made by Meniffee Tatum and wife to the other defendants, conveying real and personal property to secure an alleged indebtedness from Meniffee Tatum and wife to Tatum Brothers. It is shown in the record that, under the will of Joel Walker, father of John H. Walker and of Mrs. Tatum, she, Mrs. Tatum, became the owner of an estate, vested in John H. Walker as her trustee, secured to her sole and sepa-

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rate use during life, remainder to her children, if she had children; and if not, then over. It is averred in the pleadings, and there is testimony tending to prove it, that of Mrs. Tatum's patrimony, thus secured in trust, a considerable sum of money was paid by the trustee to her husband, which he invested in lands and personal property, taking the title in his own name. Subsequently, in 1867, he conveyed this property to John H. Walker, in trust for the said Eliza W. Tatum; and it is alleged that this was done in repayment of the said trust money which he had received from the trustee, and had converted.

In 1881, Meniffee Tatum and Eliza W., his wife, gave to Tatum Brothers a crop-lien and mortgage, to secure to them an acknowledged indebtedness of fourteen hundred dollars, and some future advances. The property thus mortgaged, it is alleged, is part of the property conveyed by Meniffee Tatum to Walker, as trustee. In the fall of 1881, Tatum Brothers took possession of the property conveyed by the mortgage, and were proceeding to dispose of it, in payment of their mortgage claim. The original bill was then filed, and an injunction obtained. It contains no averment as to the state of the account, growing out of the mortgage transaction. The *gravamen* is, that at the time the crop-lien and mortgage were executed, Meniffee Tatum had lost his reason, and was mentally incapable of making a binding contract.

An amendment of the bill was prayed for, and allowed. By it, complainant sought, first, to have Mrs. Eliza W. Tatum's name struck out as a defendant, and to have her made a co-complainant with himself. This was, as far as we can perceive, a proper amendment. The title set up makes her a proper complainant.—*Larkins v. Biddle*, 21 Ala. 252; *Michan v. Wyatt*, *Ib.* 813. The amended bill then proceeds, with minute particularity, to set forth the facts which are very generally and briefly charged in the original bill, and repeats the averment that, at the time the crop-lien and mortgage were executed, Meniffee Tatum was mentally incapable of making a binding contract. It also avers oppression, fraud, deceit and circumvention, exercised and practiced by Tatum Brothers on Mrs. E. W. Tatum, by which they procured her signature to the crop-lien and mortgage. It prays, also, that the conveyance be declared void, and set aside as a cloud on the title. Up to this point, there is no material repugnancy between the original and amended bills. The amended bill then proceeds in the following language: "If orator and oratrix are mistaken in praying for this relief [declaring the conveyance void], that defendants be required to account for the proceeds of the sale of the personal property seized by said Tatum Brothers and sold by them, and that they be required to account and give credit upon said

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note and mortgage at a reasonable price for said personal property; . . . and that it be referred to the register of this honorable court to ascertain and report, after allowing all credits to which complainants are entitled, how much remains due, if any, upon said note and mortgage; and that upon the payment of the amount so ascertained to be due, said note and mortgage be delivered up and cancelled." There was a demurrer to this amended bill, assigning as a ground that it made a new case.

The original bill contained neither averment nor prayer which looks to any result other than the vacation and avoidance of the note and mortgage. The second aspect of the amended bill, if well pleaded, prays relief on the postulated fact, that the note and mortgage constitute a valid contract. The one prays relief, which can be granted only on the overthrow of the mortgage; the other claims relief which requires the maintenance of the mortgage as a valid security. The one would strike down the security; the other would redeem under it, as a valid lien. Such incompatible reliefs can not be prayed for in one bill.—*Larkins v. Biddle*, 21 Ala. 252; *Micou v. Ashurst*, 55 Ala. 607; *Gordon v. Ross*, 63 Ala. 363; *Lehman v. Meyer*, 67 Ala. 396; *Moog v. Talcott*, 72 Ala. 210; *Heyer v. Bromberg*, 74 Ala. 524; *Caldwell v. King*, 76 Ala. 149.

The relief which complainants obtained in this case is not founded on the only aspect presented in the original bill, which is also the leading aspect presented in the amended bill. The chancellor did not find that issue in favor of complainants, and we are not prepared to say he erred therein. The alleged mental incapacity of Meniffee Tatum to make a binding contract is scarcely proved. The relief granted was under the prayer to redeem. As a bill to redeem under the mortgage, the amendment is insufficient. It fails to tender the amount that may be due on the mortgage, which is always necessary, unless in taking the account nothing is found to be due; and when that is the case, there must be an averment that nothing is due. This bill contains no such averment. When seeking to redeem, the only safe plan is to tender in the bill what may be found due. This will save the case, even if the averment of full payment is not made good.—*Rogers v. Torbut*, 58 Ala. 523; *McGehee v. Lehman*, 65 Ala. 316; *Dozier v. Mitchell*, 1*b.* 511; *Garland v. Watson*, 74 Ala. 323.

The complainants in this case are in a hopeless dilemma. If we treat the alternate phase of the amended bill as an insufficient, and therefore abortive effort, to redeem the mortgage property; then the decree is without averments to support it, and must be reversed on that account. On the other hand, if we treat the redemption aspect of the bill as sufficient in averment, then it is incompatible with the primary aspect—prays

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repugnant relief, makes a new case, and the demurrer should have been sustained; and if amended, so as to make it a sufficient bill to redeem, the same result must follow.

The decree of the chancellor is reversed, and a decree here rendered, dismissing the bill, but without prejudice to the institution of another suit, as complainants may be advised. Let the costs of the suit, and the costs of the appeal in the court below and in this court, be paid by appellees.

Reversed and rendered.

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Bill in Equity by Wards, to enforce and foreclose Mortgage given by Guardian to Surety on Official Bond.

1. *Subrogation of creditor to rights of surety.*—All pledges or securities, given by the principal debtor to his surety, for his indemnity, are regarded as a trust fund for the payment of the debt; and the creditor is entitled to be subrogated to all the rights thereby conferred on the surety, whether the latter has been damaged or not; but he has no greater rights than are conferred on the surety, and can not enforce a mortgage, or other instrument, given merely to save the surety harmless against a contingent liability or loss which has not happened.—at least, without the intervening insolvency of both the principal and the surety.

2. *Same; mortgage construed as intended for indemnity of surety, and enuring to benefit of creditor.*—A mortgage, executed by a guardian to the surety on his official bond, conditioned that he "shall manage said guardianship in the terms of the law," and, if he "fails to comply with the terms of the law in the said guardianship, and cause loss by the said" surety, authorizing him to sell, and to apply the proceeds "to the payment of said loss," enures to the benefit of the ward, and may be enforced by him, on failure of the guardian to pay the amount adjudged against him on final settlement of his accounts.

APPEAL from the Chancery Court of Tallapoosa.

Heard before the Hon. N. S. GRAHAM.

The bill in this case was filed on the 23d May, 1883, by John H. Daniel and his sister, Mrs. Elizabeth Wells, against Richard H. Hunt and others; and sought to enforce and foreclose, for the complainants' benefit, a mortgage executed to said Hunt by one Martin C. Burnett, who was then complainants' guardian. The mortgage, a copy of which was made an exhibit to the bill, was dated the 10th November, 1862, and purported to be given "in consideration that said R. H. Hunt did, on the 10th October, 1862, sign a certain bond as guardianship for the person and property of John H. and Elizabeth Daniel, as security for the said Martin C. Burnett as guardian for the said minors,

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and for the further consideration of one dollar in hand paid." The condition of the mortgage was in these words: "*Provided* I, the said Martin C. Burnett, shall well and truly manage said guardianship in the terms of the law, and pay the legal expenses of these presents, then this obligation to be void; but, if I, the said Martin C. Burnett, fail to comply with the terms of the law in the said guardianship, and cause loss by the said R. H. Hunt, I, by these presents, authorize the said R. H. Hunt, his heirs and assigns, to seize upon the said tract or parcel of land, and sell it for the highest price he may be able to get, and apply the proceeds to the payment of said loss and expenses, as aforesaid." Said Burnett's official bond as guardian, a copy of which was also made an exhibit to the bill, was dated October 22d, 1862, and conditioned that he "shall well and truly perform all duties which are or may be by law required of him as such guardian." The bill alleged that said Burnett resigned the guardianship in December, 1863, and filed his accounts and vouchers for a final settlement; and that a decree was rendered against him by the Probate Court, on final settlement of his accounts, on the 11th May, 1864, by which it was ascertained that he owed his said wards a balance of \$1,125.31; and it was further ordered, "that whenever any person comes forward and qualifies as the law directs as such guardian, execution shall issue against the said Martin C. Burnett, and in favor of said guardian, for the use of said wards, for said sum of \$1,125.31." The bill alleged, also, that no portion of this decree had ever been paid; that no other person was ever appointed guardian of the complainants; that said Burnett afterwards removed from Alabama, and died in Georgia, intestate, and insolvent, leaving no property whatever in Alabama. On these averments, the bill prayed that the amount due to the complainants by their deceased guardian be ascertained by the decree of the court; that the mortgage "be declared a lien and security in their favor, for the sum ascertained to be due them, on the lands therein described; that a foreclosure of said mortgage be decreed for their benefit," and for other and further relief under the general prayer.

The defendants demurred to the bill, assigning the following as one ground of demurrer: (2.) "Because the bill shows that said mortgage to Hunt was one of indemnity to him as the alleged surety of said Burnett as guardian of complainants, and not to be foreclosed until he had sustained or suffered loss; and it does not anywhere aver or show that said Hunt had ever been damaged, or sustained any loss, and does not make out a proper case of subrogation." The chancellor sustained the demurrer, on this ground; and his decree is now assigned as error.

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JNO. M. CHILTON, for appellant, cited *Ohio L. & T. Co. v. Ledyard*, 8 Ala. 872; *Neal's Adm'r v. McMullen*, 60 Ala. 552; *Forrest v. Luddington*, 68 Ala. 1; *Saffold v. Wade*, 51 Ala. 214.

WM. H. BARNES, and BULGER, OLIVER & GARRETT, *contra*, cited *Brandt on Suretyship*, 384, § 284; *Osborne v. Noble*, 46 Miss. 449; *Homer v. Savings Bank*, 7 Conn. 478; *Van Orden v. Durham*, 35 Cal. 136.

SOMERVILLE, J.—The broad doctrine prevails in this State, touching the principle of subrogation, that a creditor is entitled to the benefit of all pledges or securities, given to, or in the hands of a surety, for his indemnity. And this is the rule, whether the surety has been damnified or not, inasmuch as such securities are generally regarded as a *trust* created for the payment of the debt.—*Colt v. Barnes*, 64 Ala. 108; *Saffold v. Wade*, 51 Ala. 214; *Forrest v. Luddington*, 68 Ala. 1, and cases cited.

While this principle is not denied, it is insisted, on the part of the appellees' counsel, that where a surety holds a mortgage, or other security, merely for his own personal benefit or indemnity, as distinguished from the idea of creating a security for the debt, or of providing means for its payment, the creditor is not entitled to any greater rights or remedies than the surety; and that the latter's indemnity is not available to the creditor, unless in the event of the insolvency of both the principal and the surety, which originates a new equity in favor of the creditor. The correctness of this principle may be conceded, in view of the fact that the rights of the creditor must necessarily be measured by those of the surety, and being wrought out through the equity of subrogation, which is but the substitution of one person in the shoes of another, they can be neither increased nor diminished by such act of transfer.—*Sheldon on Subrog.*, §§ 157, 160, 162; *Brandt on Sur.*, §§ 282–85; *Forrest v. Luddington*, *supra*.

So, the rights of the surety must be determined by the terms of the instrument which creates the indemnity. If the mortgage, or other security, is not given to secure the debt, or to provide a fund for its payment, but merely to save harmless from a contingent liability or loss, the contingency must happen, or the loss be sustained, before a right arises in favor of the creditor to the indemnity,—at least, without the intervening insolvency of both the principal and the surety. In *Osborne v. Noble*, 46 Miss. 449, we find the general rule succinctly stated as follows: "Where the contract is for the personal benefit of the surety, in opposition to the idea of a pledge for the debt,

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or providing means for its payment, the creditor can claim only such rights and remedies as the surety had. If he has not been damnified, and the conditions of the mortgage, or other contract of indemnity, are unbroken, the surety himself could assert no remedy; nor could the creditor, claiming through him, and in his stead, have substitution."—*Bibb v. Martin*, 14 S. & M. (Miss.) 87; Sheldon on Subrog. §§ 157, 160; Brandt on Sur. § 284.

The mortgage in the present case was executed by the principal in a guardian bond, as an indemnity to the defendant, who was his surety. The condition of the mortgage is, that the mortgagor, as guardian, should well and truly manage his guardianship "in terms of the law"; by which we are to understand, that he would faithfully discharge all the duties of his office which were imposed upon him by law. This included, of course, the payment to his wards of any balance due them on the final settlement of the guardianship, which is shown by the bill to be something over eleven hundred dollars.

The mortgage further provides, that if the guardian, Burnett, failed "to comply with the terms of the law in the said guardianship, and caused loss by the said R. H. Hunt [the surety]," the latter was authorized to take possession of the land mortgaged, and sell the same for the payment of such loss, and certain expenses. It is objected by demurrer, that the instrument contemplates an actual loss by the surety incurred by his payment of the debt; and that it was therefore intended, not as a security for the payment of the debt, but merely for the personal benefit of the surety himself, upon a contingency which has not yet happened. We do not so construe the instrument. The condition of the mortgage was broken, when the guardian failed to pay over to the complainants the balance which he owed them on final settlement. When this happened, there was, in legal contemplation, a loss to the surety, who was personally bound for the payment of the debt. It is plain that the word "loss," here, means nothing more than legal damage, detriment, or forfeiture. We can see nothing in the language of this instrument, which rebuts the view that the security given was intended to attach to the debt as an accessory to it, being held in trust by the mortgagee for the benefit of the creditor, rather than for his own personal indemnity upon the contingency of his paying the surety debt.

It was not necessary that the debt should have been reduced to judgment, or that the creditors should have exhausted their legal remedies, before becoming entitled to the equity of subrogation. The whole equity of the bill is based upon the theory of enforcing a trust, which is claimed to enure to the benefit

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of the complainants by subrogation.—*Saffold v. Wade*, 51 Ala. 214.

The chancellor erred in sustaining the demurrer to the bill; and his decree is reversed, and the cause remanded.

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Certiorari to Justice's Judgment in Action of Forcible Entry and Detainer, or Unlawful Detainer.

1. *Appeal and certiorari from justice's judgment; trial de novo, and amendment of complaint.*—When a cause is removed from a justice's court into the Circuit Court, either by appeal or by *certiorari*, it is triable *de novo*, without regard to any defect in the proceedings (Code, § 3121); and a trial may be there had on the original complaint, which may be amended, or a new complaint may be filed.

2. *Complaint in forcible entry and detainer, and unlawful detainer.*—A count for forcible entry and detainer, and a count for unlawful detainer, may be united in the same complaint; and if the original complaint, filed in the justice's court, was for forcible entry and detainer, a complaint for unlawful detainer may be filed in the Circuit Court.

3. *Demand of possession, and proof thereof.*—To maintain an action of unlawful detainer, a written demand of possession is indispensable (Code, § 3697); and parol evidence of such demand can not be received, until a proper predicate has been laid by notice and failure to produce it.

4. *Specific objection to evidence.*—A specific objection to evidence is a waiver of all other grounds of objection.

5. *Notice to produce paper.*—As to the sufficiency of the notice to produce a paper, the question depends on the attendant circumstances, and the time required to produce the paper: when the paper is in court, and in power of the party to produce immediately, notice at the trial is sufficient; and if he denies in open court that he ever had possession of the paper, or that it was ever delivered to him, he can not object to the sufficiency of the notice to produce; nor can he complain that the court required him to answer whether he had the paper.

6. *Charge as to law 'abhorring subterfuge and evasion.'*—As an abstract proposition, "the law abhors subterfuge, and despises mean dodges and evasion;" but a charge, asserting that proposition, is not abstract, when the bill of exceptions states evidence showing conduct on the part of the defendant which may be thus characterized.

7. *Abstract charge; presumption in favor of judgment.*—An abstract charge given, which asserts a correct legal proposition, will not work a reversal; and when the bill of exceptions does not purport to set out all the evidence, this court will presume, if necessary to support a charge given, that there was evidence justifying it.

8. *Estoppel between landlord and tenant.*—A tenant can not dispute the title of the landlord under whom he entered, while still holding under him, but must first surrender the possession in good faith; it is not enough that he left the possession for a few days, without notice to his landlord, and again resumed it by collusion with another person.

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APPEAL from the Circuit Court of Lee.

Tried before the Hon. H. D. CLAYTON.

This action was brought by J. W. Clayton, against J. H. Littleton; was commenced before a justice of the peace, on the 24th January, 1881, and was removed by *certiorari*, sued out by the defendant, into the Circuit Court. In the summons issued by the justice, the cause of action is described as "a detainer, or unlawful detainer, as the case may be;" and in the petition for a *certiorari*, the bonds executed by the defendant, and the justice's return to the writ, it is called an action of "unlawful detainer"; while the complaint, or statement of the cause of action, averred that the defendant, while the plaintiff was in possession under a term of years, "with force did enter upon said lands, and detain the same, and did turn or keep the plaintiff out of possession, whereby plaintiff was ejected, or dis-seised of and from the peaceable possession of said lands, and is still dispossessed thereof." In the Circuit Court, a complaint was filed in regular form as for an unlawful detainer, alleging that the defendant entered into the possession as plaintiff's tenant, and held over after the expiration of his term, and refused to surrender the possession on demand in writing. The defendant moved to strike this complaint from the files, because it was for a different cause of action from that declared on before the justice of the peace; and he reserved an exception to the overruling of his motion.

On the trial, as the bill of exceptions further shows, the plaintiff having proved, by his wife, that the defendant entered into possession of the premises as his tenant for the year 1880, executing a promissory note for the rent, which he paid at the end of the year, he then offered to prove by her a demand in writing for the surrender of the possession; "to which the defendant objected, because the writing was not produced." Thereupon, the court allowed the witness to state, against the objection of the defendant, that she was present when the written demand was made; that she had read it, and had taken a copy of it; and that she had made diligent search for the copy, but could not find it." Plaintiff then demanded of defendant said written notice, and defendant refused to make reply, or to produce said written notice and demand; whereupon, the court required the defendant to be sworn to answer questions, and defendant then testified, in reply to a question by the court, that no written demand for the possession of the premises had ever been made of him, and that he did not have such written demand, here or elsewhere. To this action of the court, requiring him to be sworn, and to answer questions, the defendant excepted:" and the court having then permitted the plaintiff's wife to testify as to the contents of the written de-

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mand, he objected and excepted to the admission of her testimony, "on the ground that no notice had been given him, prior to the trial, to produce said original demand in writing."

The defendant, testifying as a witness for himself, admitted that he entered into the possession, at first, as the tenant of plaintiff's wife, who was then a widow, and held under her for a year, and that he rented from plaintiff the next year, and paid him rent; but he further stated, "that he removed from the premises at the expiration of the term of renting, and soon afterwards returned; that his father, who had resided on the east half of said section for more than twenty years, told him that he had as good right as any body to the whole of said east half, and requested him to return to the land; that he was then moved back on the land by his father, and had since held under him." Defendant further testified, in this connection, "that he was unable to state whether this information and request of his father was before or after he had removed from the land at the expiration of his term, or how long he was off the premises before he moved back; nor could he state whether plaintiff had any knowledge of his removal, or knew that he was setting up an adverse holding of the possession." The court charged the jury, "among other things, in substance as follows: If the defendant did in fact remove from the premises as the tenant of plaintiff, and surrendered the possession to him, plaintiff can not recover in this suit, although defendant may have afterwards returned to the lands, and is now in possession under his father. On the other hand, the defendant can not defeat the plaintiff's right to recover, by simply moving off the lands, and then soon after moving back. Whose tenant was he at the beginning of this suit, is a material inquiry. If he went into possession as plaintiff's tenant, he could not change the relation by simply moving off and then moving back soon after. *The law abhors subterfuge—it despises mean dodges and evasions.* You will therefore consider all the evidence showing the circumstances of the defendant's removal and return, to determine whether his relation as tenant to the plaintiff was changed thereby." To the italicized portion of this charge the defendant excepted.

On the removal of the case into the Circuit Court, the defendant had executed a bond in the penalty of \$50, conditioned that he would prosecute the *certiorari* to effect, or pay whatever judgment the plaintiff might recover against him; and another bond for the costs, in the penalty of \$30. The jury having returned a verdict for the plaintiff, assessing the rental value of the premises at \$75, the court thereupon rendered judgment in his favor for the possession, and against the defendant and his sureties on the first bond for the amount of

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the penalty, and against him and his sureties on the second bond for the amount of the penalty, and against the defendant alone for the excess of the rental value and costs.

The several rulings of the court to which, as above stated, exceptions were reserved by the defendants, and the personal judgment against him in excess of the penalty of the bonds, are now assigned as error.

JOHN M. CHILTON, for appellant.

GEO. P. HARRISON, Jr., *contra*.

CLOPTON, J.—The notice issued by the justice of the peace, the petition for a *certiorari*, the bonds made by the defendant on the writ being issued, and the statement of the cause returned by the justice to the Circuit Court, designate the action as for unlawful detainer. On appeal, the case is tried *de novo*, without regard to any defect in the proceedings. A trial may be had in the Circuit Court, on the complaint before the justice, or a new complaint may be filed; and the complaint before the justice is subject to amendment. Different counts, for forcible entry and detainer, and unlawful detainer, may be united in the same complaint. Conceding that the complaint before the justice is for forcible entry and detainer, a new complaint for unlawful detainer, filed in the Circuit Court, is not a change of the form of action, or the substitution or introduction of an entirely new cause of action.

A demand in writing to deliver the possession of the premises is indispensable to maintain an action of unlawful detainer; and before secondary evidence of its contents is admissible, the same predicate must be laid as in case of other written instruments in the possession of the opposite party.—*Dumas v. Hunter*, 30 Ala. 75; *King v. Bolling*, at present term. The *specified* ground of objection to the secondary evidence of the contents of the written demand is, that notice to produce it had not been given to defendant prior to the trial. A particular ground of objection having been specified, all other grounds are treated and considered as waived.—*Jacques v. Horton*, 76 Ala. 438. It is unnecessary, therefore, to consider whether sufficient preliminary proof of the loss of the copy was made, to let in parol evidence of its contents.

The purpose of notice to a party to produce a paper in his possession is, to afford him an opportunity to produce it, if he desires, and, if he fails or refuses, to let in secondary evidence of its contents. The length of time for which the notice should be given depends on the attendant circumstances, and the time required to obtain the paper. The notice should be

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for a reasonable time—sufficiently long to enable the party to procure and produce it without undue inconvenience. If the paper is not in court, and can not be produced without delaying the trial, notice should be given prior to the trial; but, when the paper is in court, and in the power of the party to produce immediately, notice at the trial is sufficient.—*Brown v. Isbell*, 11 Ala. 1009; *Dwyer v. Collins*, 7 Ex. 639; 1 Whart. on Ev. § 155. Baron Parke said, to allow such an objection to prevail, when the paper is admitted to be in court, “would be some scandal to the administration of the law.” The written demand, however, was neither admitted, nor shown to be in court. The witness testified, that it was delivered to the defendant; and the defendant testified, that no written demand had ever been made, and that he had no such paper in his possession, in court or elsewhere. When a party denies having possession of the paper called for, the reason for giving notice to produce it ceases. It would be useless to give a party notice to produce a paper, which he asserts in open court he never received, and had not in his possession.—*Roberts v. Spencer*, 123 Mass. 397.

Under the circumstances that occurred at the trial, the objection that notice to produce the paper had not been previously given, can not prevail.

It was the prerogative, and within the power of the court, on the refusal of the defendant to reply to the notice, or to produce the demand, to examine him as to its possession, in order to be informed as to the sufficiency of the notice. Such examination could not have operated injury to the defendant, and enabled the court to decide the preliminary fact, on which the admissibility of the secondary evidence depended. Whether a written demand had been given, was an inquiry for the jury.

The court, in the general charge, observed: “The law abhors subterfuge; it despises mean dodges and evasions.” Exception was taken to this part of the charge, on the ground that it was abstract. If it be conceded that the charge is abstract, it will not be controverted that it asserts a correct proposition of law; and an abstract charge, which asserts a correct legal proposition, will not work a reversal. The bill of exceptions does not profess to set out all the evidence; and if necessary to support the charge, we would presume there was evidence on which to found it. There is evidence in the record that the defendant moved off the premises, at the expiration of his rental term, and soon thereafter returned thereon at the request of his father, who asserted a claim to the land. This evidence tended to show that the defendant moved off and returned by collusion with his father, to put his landlord at a disadvantage, and under the supposition that he would

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thereby evade an estoppel. The jury found this to be true, and, if true, it was a subterfuge and an evasion.

No rule of law is more generally settled, than that a tenant, while he is in possession, can not dispute the title of his landlord, nor set up a superior title in himself or a stranger, to defeat an action by the landlord to regain possession. The tenant, by renting and receiving possession from the landlord, recognizes his title, and is precluded from showing that he had no title at the time of the renting. If the tenant desires to assert title in himself or another; he must surrender possession of the premises, and give his landlord the advantage of possession in any litigation as to the title. Mere leaving possession and resuming it a short time afterwards, without notice to the landlord, or giving him an opportunity to take possession, is not sufficient. The tenant must act in good faith, and restore the landlord to the same condition in which he was when he accepted possession from him.—*Houston v. Farriss*, 71 Ala. 570; *Norwood v. Kirby*, 70 Ala. 397; *Russell v. Erwin*, 38 Ala. 44; Tay. on Land. & Ten. § 705. There are exceptions to the general rule, but this case does not fall within any of them.

The judgment, though somewhat irregular in form, is substantially such as the statute authorizes.—*Beck v. Glenn*, 69 Ala. 121.

Affirmed.

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Trespass for Illegal Seizure of Stock of Goods.

1. *Actions against joint trespassers; discontinuance.*—A plaintiff may, at his election, maintain a separate action against each of several joint trespassers, or a joint action against all, though he can have but one satisfaction; and if he elects to bring a joint action, he may “sue out an *alias* summons, or discontinue as to those on whom the summons is not served, and proceed to judgment against those on whom it has been executed” (Code, § 2911); but the statute does not authorize him to sue out an *alias* summons as to one not served, take a final judgment by default against another, and continue as to a third who appears and pleads; and by such judgment the entire cause is discontinued.

APPEAL from the Circuit Court of Clay.

Tried before the Hon. LEROY F. BOX.

This action was brought by Merit Street, against James B. Slade, W. B. Jackson, and three other persons, to recover dam-

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ages for an alleged trespass by the defendants in seizing a stock of goods belonging to the plaintiff; and was commenced on the 12th December, 1884. At the return term of the summons, in January, 1885, as the judgment-entry shows, an *alias* summons was asked and granted against C. A. Etheridge, who had not been served; the cause was continued as to William J. Ware and John W. Blackstocks, each of whom had appeared, and pleaded not guilty; a judgment by default, with writ of inquiry, was taken against said Slade and Jackson; and the writ being executed, judgment final was rendered against them jointly, for \$5,250. From this judgment Slade and Jackson now appeal, and assign it as error, insisting that the cause was discontinued.

JNO. M. CHILTON, and J. R. DOWDELL, for appellants.

PAASONS, PEARCE & KELLY, *contra*.

CLOPTON, J.—The action is brought by appellee, against several defendants, five in number, to recover damages for an alleged joint trespass. At the first term to which the summons was returnable, the plaintiff obtained judgment by default against the appellants, had the damages assessed, and final judgment rendered; continued the action as to two of the defendants who had filed separate pleas in bar, and took an *alias* summons to the fifth, on whom process had not been executed. The question is, what is the effect of these proceedings on the action?

Section 2911 of Code provides: "When any suit is instituted against two or more persons, upon any joint, or joint and several cause of action, the plaintiff may, at his election, sue out an *alias* summons, or discontinue as to those on whom the summons is not served, and proceed to judgment against those on whom it has been executed." The pre-existing statute was, by its terms, limited to suits against "any two or more joint, or joint and several obligors, covenantors, or drawers" of any bond, covenant, bill, or promissory note, or against any two or more of the defendants to any joint judgment. Under the operation of the statute last mentioned, it was held, in an action on an open account: "There is no authority, on a cause of action such as this, either to institute suit in the first instance against one of the several debtors, and, after suit commenced against all of the parties chargeable, to discontinue as to those who are not served with process (until after an *alias* and *pluries* writ against them returned not found), and proceed to judgment against the party taken."—*Kennedy v. Russell*, Minor, 77; *Thompson v. Saffold*, 2 Stew. 494. Under the statute, it was

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uniformly held, from an early period, that in an action on a contract to which the provisions of the statute did not extend, a discontinuance as to one of two or more defendants, who was not served, before the return of an *alias* or *pluries* writ not found; and in an action on a contract included within the provisions of the statute, a discontinuance as to a defendant served, where there were two or more defendants, other than for a defense personal in its nature, operated a discontinuance of the entire action.—*Adkins v. Allen*, 1 Stew. 130; *Keebles v. Ford*, 5 Ala. 183; *Givens v. Robbins*, *Ib.* 676.

The present statute, which was introduced in the Code of 1852 as section 2149, is a re-enactment of the preceding statute, but extending its provisions to actions on any *joint* or *joint and several contract*, or upon any *joint* or *joint and several cause of action*. Its terms comprehend every suit, in which the cause of action is joint, or joint and several, either by statute or common law, and whether in contract or otherwise. In conformity with the judicial construction placed on the preceding statute, it has also been held, under the present statute, that in an action against two or more persons, on a contract, a discontinuance as to one of several defendants, all of whom had been served, or a continuance as to one not found, and judgment taken against the others, discontinues the entire cause.—*Mock v. Walker*, 42 Ala. 668; *Curtis v. Cummins*, 46 Ala. 455; *Reynolds v. Simpkins*, 67 Ala. 378. It may, however, be said, that in each of these cases the suit was founded on a contract, and that the rule should be limited to such cases.

A plaintiff may bring his action for a joint trespass, against any one or all the wrong-doers, or successive actions against each; and proceeding to judgment in a separate suit against one is no bar, without satisfaction, to subsequent suits against the others. It is conceded, if he brings a joint action against all the *tort-feasors*, he may, before judgment, dismiss as to all but one, whether served or not served with process, and proceed to judgment against the remaining defendant. The statute was not intended to abridge or modify any of these common-law rights. Whether the action is on a contract, or for a tort, the statute leaves the consequences resulting from a discontinuance as to a party on whom process had been served, as they were at common law. But, in both classes of actions, the cause of action being joint, or joint and several, where one of the defendants has not been served with process, the statute confers on the plaintiff the right to elect, whether he will take an *alias* summons as to such defendant, or discontinue as to him, and proceed to judgment as to those on whom summons has been executed. It does not modify in any other respect the common law. It authorizes the plaintiff to take judgment against the

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parties served, only in the event he elects to discontinue as to the party not served; and by clear implication, it is prohibitory in this aspect.

The action, at its commencement, was joint; and while the plaintiff had the election to bring either a joint action against all the defendants, or separate actions against each, neither the statute nor the common law authorizes him to split his action after pendency of the suit, and convert what was, at its institution, a *joint* action, into several *separate* actions. Where the suit is against several joint trespassers, the judgment must be for a single sum, against all the defendants found guilty; and if the jury, on a return of a joint verdict of guilty, assess several damages against the several defendants, it is optional with the plaintiff to have a *venire de novo*, or to enter, before judgment, a *nolle prosequi* as to all but one of the defendants. He is not entitled to hold the separate and several judgments. *Layman v. Hendrix*, 1 Ala. 212. The plaintiff has already obtained judgment against two of the defendants, for a specified amount; at the next term of the court, he may obtain judgment against the other defendants who have pleaded; and at a subsequent term, against the defendant as to whom an *alias* summons was taken, for other and different amounts. This result the law will not allow. The plaintiff had his election to discontinue as to all the defendants except the appellants, and proceed to judgment against them, or to take an interlocutory judgment by default against them, continue the cause as to *all* the defendants, take an *alias* summons as to the one not found, and at the proper time let the same jury assess the damages against all. But by no proceedings known to the law can a joint action against several persons be converted, without consent, into separate actions against each. By the proceedings pursued in the present case, the unity of the action is destroyed, the continuity of the cause is broken, and a chasm has occurred in the proceedings, after the pendency of the suit. The legal consequence is a discontinuance of the entire action.

A trial of every action on its merits is greatly preferable; and we have been reluctantly forced to this conclusion. But to hold otherwise, will involve overruling the decisions of this court from the earliest period of the judicial history of the State to the present time, and tend to produce inextricable confusion in judicial proceedings. This case furnishes a significant illustration—one part of the action now pending in this court, and another part in the Circuit Court.

Reversed and rendered.

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Street v. McClerkin.*Statutory Detinue for Horse.*

1. *Proof of defendant's possession.*—In detinue, or the corresponding statutory action, the plaintiff is not entitled to recover, unless it is shown or admitted that the defendant had possession at the commencement of the suit; but, when the bill of exceptions shows it was proved that a purchaser at constable's sale, the validity of which is attacked, sold the property to the defendant soon afterwards, and there is no proof of any subsequent change in the possession, this court can not say that the jury were not authorized to find that the possession continued in him.

2. *Validity of mortgage, as against prior judgment.*—As against a judgment, which is evidence of an indebtedness from the date of its rendition, a mortgage subsequently executed by the debtor, in the absence of proof of its consideration, must be adjudged voluntary, and constructively fraudulent; but, as between the parties, the mortgage is valid, and confers on the mortgagee a title on which he may maintain an action against any one who does not connect himself with the judgment.

3. *Sale by constable; irregularities not rendering void.*—A sale under execution by a special constable, whose appointment was unauthorized (Code, § 768), is not void; and though it is irregular, if made in a precinct and county other than that of the defendant's residence (Code, § 3637), it is not void.

4. *Execution issued by justice of the peace, and sent into another county.* An execution issued by a justice of the peace, and sent to another county to be executed, must be authenticated by the certificate of the probate judge, or of a justice of the peace of the latter county who is acquainted with his handwriting (Code, § 3647); and if not so authenticated, a levy under it is void.

APPEAL from the Circuit Court of Talladega.

Tried before the Hon. LEROY F. BOX.

This action was brought by Merit Street, against James McClerkin, to recover a horse, with damages for its detention; and was commenced on the 11th November, 1882. The plaintiff having executed the necessary bonds, and the defendant failing to give bond, the horse was delivered to the possession of the plaintiff. The defendant pleaded *non detinet*, and a special plea, which alleged that the horse "is not the property of the plaintiff, but is the property of this defendant, and was his property at the commencement of this suit;" and the cause was tried on issue joined on these pleas. The plaintiff claimed the horse under a mortgage executed to him by one Murphy, which was dated December 26th, 1881, and the law-day of which was November 1st, 1882; while the defendant claimed under a purchase from J. M. Stewart & Co., who bought him at a sale made by one Hingston as constable, on the 28th Jan-

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uary, 1881, under execution against said Murphy. The plaintiff's mortgage was executed in Talladega county, where said Murphy then resided, and was recorded in that county on the 18th January, 1882. The execution, under which the levy and sale were made, was issued on the 22d December, 1881, by a justice of the peace in Calhoun county; and was founded on a judgment which he had rendered on the 10th November, 1881, in favor of J. Draper & Co., against said Murphy, who then resided in Calhoun county; "on which execution," as the bill of exceptions states the defendant's evidence tended to show, "said Draper & Co. procured the certificate of J. C. Hendricks, a justice of the peace in precinct No. 3 in Talladega county, in conformity to section 3647 of the Code, and placed in the hands of said Hingston, who was the regular constable in said precinct in Calhoun county, and who proceeded to Talladega county, where he was appointed by said Hendricks special constable to execute said writ." The plaintiff's evidence, "in rebuttal, tended to show that the only indorsement made on said execution by said Hendricks was the appointment of said Hingston as special constable to execute the same;" and that the appointment was made at the suggestion of one Brittle, the regular constable of the precinct, who was a brother-in-law of said Murphy. The horse was carried back by the constable into Calhoun county, and was there sold under the levy, on the 28th January, 1881, in the precinct in which the judgment was rendered. The defendant's evidence tended to show, also, "that said J. M. Stewart & Co. became the purchasers at said sale, and soon afterwards sold said horse, for his full value, to the defendant." There was other evidence, relating to the question of notice of plaintiff's mortgage, which is not material.

The court charged the jury, among other things, as follows: (1.) "In suits of this character, the evidence must show that the defendant had possession of the property sued for, at the commencement of the suit; and the burden of proving this fact to the reasonable satisfaction of the jury is on the plaintiff; and if the jury are not reasonably satisfied that the defendant had the possession of the horse at the commencement of the suit, their verdict must be for the defendant." (2.) "It is the policy of the law to uphold the title of third persons who purchase at judicial sales, and such persons are protected against irregularities on the part of the officers in executing process, of which the purchasers had no notice."

The plaintiff excepted to these charges, and then requested several charges in writing, among which were the following: (1.) "If the jury find, from the evidence, that the justice of the peace appointed a special constable, when at the time there

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was a regular commissioned and bonded constable in the precinct, the appointment was a nullity, and gave such special constable no right to levy the execution; and that any levy indorsed by him on the execution would also be a nullity, and would not constitute the defendant a *bona fide* purchaser without notice; and if they further find that the plaintiff's mortgage was regularly recorded before the sale of the mortgaged property to the defendant, then the defendant would not be a *bona fide* purchaser without notice, and they should find for the plaintiff." (5.) "If the jury find, from the evidence, that the only indorsement made on the execution by said Hendricks, as justice of the peace, was an authority to Hingston to execute the writ; and they fail to find that said execution was certified by the judge of probate of the county in which said justice of the peace resided, or by a justice of Talladega county who had knowledge of the handwriting of the justice who issued it, then the levy would be void." The court refused each of the charges asked, and the plaintiff reserved a general exception to their refusal.

The several charges given, and the refusal of the charges asked, are now assigned as error.

D. T. CASTLEBERRY, for appellant.

PARSONS, PEARCE & KELLY, *contra*.

STONE, C. J.—We are asked to affirm the judgment in this case, without any reference to the rulings of the court, on the following principle: The bill of exceptions states it contains all the evidence, and it is contended there is no proof that the horse sued for was in McClerkin's possession when the suit was brought. That being a necessary condition to plaintiff's right to recover, the contention is that he fails to show any right of recovery, and it is immaterial what errors of ruling the court may have fallen into; they would, at most, be errors without injury, which are not grounds of reversal.—*Alexander v. Caldwell*, 61 Ala. 543.

We do not think the principle applicable to this case, for the following, among other reasons: It was shown that when the horse was sold, at constable's sale, J. M. Stewart & Co. purchased, and soon afterwards sold said horse to McClerkin; and there is no proof that the latter had parted with the possession, when the sheriff took possession under the writ in this case. In the absence of all proof to the contrary, we can not affirm the jury were without warrant for finding the horse continued in the same custody he was last shown to have been in.

Street, the plaintiff, relied on a mortgage executed by Mur-

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phy to him, bearing date December 26, 1881. He offered no proof of any consideration, or debt, to uphold said mortgage. This was Street's only evidence of title. In November, 1881, J. Draper & Co. recovered a judgment against Murphy for eighty dollars, before a justice of the peace in Calhoun county, where Murphy then resided. This judgment was evidence of indebtedness from Murphy to J. Draper & Co., from the time of its rendition, and, as against them, cast on any one claiming an after-acquired interest in Murphy's property, the duty of proving a consideration therefor. In the absence of such proof, Street's mortgage must be adjudged voluntary, and constructively fraudulent against Murphy's existing creditors.—*Zel-nicker v. Brigham*, 74 Ala. 598. The conveyance is good, however, between Murphy and Street, and vests in the latter a title which would maintain an action against Murphy, and against any one else who does not connect himself with a better right. Draper & Co.'s right to assail the mortgage, for want of proven consideration, can not avail McClerkin, unless he connects himself with their right.

After the recovery of the judgment in Calhoun county by J. Draper & Co. v. Murphy, the latter removed to Talladega county, and resided there when he made the mortgage to Street, December 26, 1881. An execution was issued on said judgment, and placed in the hands of Hingston, the constable of the precinct in which the judgment was rendered. Hingston carried the execution to Talladega county, and, going to the precinct in which Murphy resided, found the regular, bonded constable of the beat to be Murphy's brother-in-law, who, on that account, did not desire to execute the writ. A justice of that precinct, Hendricks, then appointed Hingston special constable, who on the 28th of December levied the execution on the horse sued for. This was two days after the mortgage from Murphy to Street was executed, but before it was put on record. Hingston then carried the horse to Calhoun county, and, after giving notice, sold him in that county, as constable, under said execution, and J. M. Stewart & Co. became the purchasers, as stated above.

It is contended for appellant, that the appointment of the special constable was void, the levy void, and that the sale was void for two reasons: first, because there was no valid levy; and second, because the sale was not made in the county and precinct in which the defendant resided. These were irregularities, but we do not think they rendered the proceeding void.—Code of 1876, § 3637; *Freem. on Ex.* §§ 289, 290.

There was uncertainty and conflict in the testimony on another point. It is contended for appellant, that the execution issued by the justice in Calhoun county was sent to Talla-

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dega county, and there levied, without the certificate of the judge of probate of Calhoun county, and without the certificate of a justice of Talladega county, who had knowledge of the Calhoun justice's hand-writing; in other words, without any authentication of the execution.—Code of 1876, § 3647. The testimony for appellee tended to show the execution was certified by Justice Hendricks, thus supplying this statutory requirement; and that for appellant, that Hendricks simply appointed Hingston special constable to execute the writ. If appellant's version of the facts be the true one—that is, if Hendricks did not certify, in substance, that he knew the hand-writing of the Calhoun justice who issued the execution, and that the signature to the execution was in his proper hand-writing—then the levy in Talladega county was without authority—was void—and the sale conveyed no title. A justice's execution can confer no authority beyond the boundaries of his county, unless it is certified as the said section of the Code requires.—Herman on Executions, § 168; Freem. on Ex. § 104; *Kinter v. Jenks*, 43 Penn. St. 445; *Dinkgrave v. Sloan*, 13 La. Ann. 393; *Bank v. St. John*, 29 Barb. 585. The fifth charge asked by the plaintiff ought to have been given.

Some testimony was given bearing on the question of notice. It will not probably be the same on another trial.

Reversed and remanded.

Grantham v. Payne.

Certiorari from Justice's Judgment.

1. *When wife may sue on note, payable to husband.*—A promissory note, given for the purchase-money of lands belonging to the statutory estate of the wife, though taken payable to the husband, is a part of the *corpus* of her estate; and she may maintain an action on it in her own name, without any assignment or transfer by the husband.

2. *Proof of ownership of note.*—In an action by the wife, on a promissory note payable to the husband, and not assigned by him, he may testify that the note belongs to the plaintiff, and not to himself.

3. *Certiorari to justice's judgment; limitation of.*—It is no objection to a *certiorari*, when sued out to review a judgment rendered by a justice of the peace, that it was sued out after the expiration of the five days allowed for taking an appeal (Code, § 3654); the limitation of the writ, in such case, "would probably be one year."

4. *Payment of judgment to justice.*—The payment of the judgment by the defendant to the justice of the peace, without an acceptance of the

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money by the plaintiff, does not bar the plaintiff's right to sue out an appeal or *certiorari*.

5. *Wife's statutory estate ; for what articles liable.*—The wife's statutory estate can not be subjected by action (Code, § 2711) to liability for articles of apparel purchased by the husband for his own individual use.

APPEAL from the Circuit Court of Jackson.

Tried before the Hon. H. C. SPEAKE.

This action was brought by Mrs. Callie E. Payne, the wife of Martin A. Payne, against M. M. Grantham, to recover an alleged balance of \$49.80 due on a promissory note ; and was commenced before a justice of the peace, on the 6th March, 1882. The note on which the action was founded was for \$350, signed by the defendant, dated February 24th, 1881, and payable to Martin A. Payne ; and it recited on its face that it was given "for balance of purchase-money of house and lot in Scottsboro." Indorsed on said note was an assignment, without date, by said M. A. Payne, to J. R. & M. Burdett, as collateral security for a debt of \$250 ; and also a credit, signed by J. W. Morris, dated February 8th, 1882, in these words : "Received on this [note] \$326.20, in full of principal and interest, except an account for \$49.80 that said Grantham holds." The justice allowed the account as a set-off against the plaintiff's claim, and rendered judgment for the plaintiff, for forty-two cents, as the balance due. This judgment was rendered on the 13th March, 1882 ; and on the 18th the plaintiff tendered an appeal bond, which the justice refused to accept, holding the security to be insufficient. On the 20th March, the defendant paid the amount of the judgment to the justice, who tendered it to the plaintiff ; but the plaintiff refused to receive the money, and applied by petition to the probate judge for a *certiorari*, to remove the proceedings into the Circuit Court. The *certiorari* was granted, being issued by the clerk of the Circuit Court, on the *fiat* of the probate judge ; and in his return to the writ the justice of the peace stated the proceedings had before him as they are above set forth.

In the Circuit Court, as the bill of exceptions shows, the defendant moved to dismiss and quash the *certiorari*, because it was sued out after the lapse of five days from the date of the judgment, and after the payment of the judgment to the justice ; and he excepted to the overruling of his motion. On the trial, M. A. Payne, the plaintiff's husband, to whom the note was payable, testified as a witness for her, that the note was given for the agreed purchase-money of a house and lot in the town of Scottsboro, which belonged to the statutory estate of his wife, and which they had sold and conveyed to the defendant ; and further : "The note is not my property, and never was. Col. Snodgrass wrote it, in my absence, and I had nothing to

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do with it. It is the property of my wife." To this answer the defendant objected, "because it contradicts the written contract by parol testimony;" and he duly excepted to the overruling of his objection. The defendant offered in evidence, under the plea of set-off, the account which had been allowed by the justice, and which was made out in favor of Snodgrass & Caldwell, merchants, against said Martin A. Payne. It consisted of boots, shoes, overcoat, and other articles, bought between February and November, 1881, amounting to \$49.80; and it was assigned by said Snodgrass & Caldwell to the defendant, November 15, 1881. As to this account, said M. A. Payne testified, in behalf of the plaintiff, "that said articles were all purchased by him, for himself, and not for his wife; and that said articles, each and all, were for his own individual use, and not for plaintiff, nor for the family." The court charged the jury, in reference to this account, "that if they believed the articles therein named were articles of apparel for the individual use and benefit of the husband, then said articles were not such as the statutory estate of the wife would be liable for, and they should be rejected and disallowed as a set-off in this case." The court charged the jury, also, that if the note was given for the purchase-money of a house and lot which belonged to the plaintiff's statutory estate, then the plaintiff might maintain an action on it in her own name, although it was made payable to the husband; and that a demand or claim against the plaintiff's husband was not available to the defendant as a set-off. To each of these charges the defendant duly excepted; and he now assigns them as error, together with the other rulings above stated.

J. E. BROWN, for appellant.

SOMERVILLE, J.—1. The action was properly brought in the name of the wife alone, as "the party really interested." She is shown to have been the beneficial owner of the note sued on, and it was a part of the *corpus* of her statutory separate estate under the laws of Alabama. Although payable on its face to the husband, he held the legal title in trust for the wife as beneficiary, and his possession was hers.—Code 1876, §§ 2890, 2892; *Wortham v. Gurley*, 75 Ala. 356.

2. The ownership of the note by the plaintiff was a fact to which her husband, Payne, could properly testify. The objection to this testimony was without force.—*Nelson v. Iverson*, 24 Ala. 9; *Elliott v. Stocks*, 67 Ala. 290; *Patterson v. Kicker*, 72 Ala. 406.

3. It was no valid objection to the writ of *certiorari*, granted by the probate judge to the justice's court, that the five

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days allowed by statute for taking an appeal to the Circuit Court had elapsed when the petition for the writ was granted. One of the chief functions of this writ is to secure a review of proceedings from which the right of appeal has been in some manner lost or barred.—*Washington v. Parker*, 60 Ala. 447; *Wright v. Gray*, 20 Ala. 363. The least time within which a limitation would be perfected as to such writs of *certiorari*, would probably be one year.—*Mason v. Moore*, 12 Ala. 578; *Enis v. Ross*, 19 Ala. 239; Code 1876, § 3949, as amended by Acts 1878–79, p. 40.

4. The payment of the judgment to the justice by the defendant, without any acceptance of the money by the plaintiff, could not manifestly affect the right of the plaintiff to have the proceedings reviewed in the Circuit Court, where the trial was required to be had *de novo*. The basis of the appeal was the failure of the plaintiff to recover the sum to which she was justly entitled, by reason of the improper allowance against her of a set-off in favor of the defendant.

5. In relation to this set-off, the court properly charged the jury, that so much of it should be disallowed as embraced articles of apparel purchased by the husband for his individual use; the separate statutory estate of the wife not being subject to the payment of such a debt, by set-off or otherwise.—Code, 1876, §§ 2706, 2710; *Durden v. McWilliams*, 31 Ala. 438.

We find no error in the rulings of the court, and the judgment is affirmed.

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Statutory Real Action in nature of Ejectment.

1. *Error without injury in admission of evidence.*—The admission of evidence which is at the time *prima facie* inadmissible, is error without injury, when the record shows that its relevancy or admissibility was established by evidence subsequently introduced.

2. *Exception to exclusion of evidence; presumption in favor of judgment.* When objection is made to the answer of a witness to an interrogatory, but not to the interrogatory itself, and the answer is not set out in the record, this court will presume that the answer was legal evidence.

3. *General exception to charges given or refused.*—A general exception to several charges given can not be sustained, unless each one of them is erroneous; nor can a general exception to the refusal of several charges asked be sustained, unless each one of them asserts a correct legal proposition, which is applicable to the evidence.

4. *New trial; refusal not revisable.*—The refusal of a new trial is not revisable by this court, on error or appeal.

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APPEAL from the Circuit Court of Cherokee.

Tried before the Hon. LEROY F. BOX.

This action was brought by Joseph W. Bedwell, against Mrs. Louisa A. Bedwell and Robert L. Bedwell, to recover the possession of a tract of land particularly described in the complaint, with damages for its detention; and was commenced on the 5th March, 1881. The record does not show what pleas were filed, but the cause was tried on issue joined, and the trial resulted in a verdict and judgment for the plaintiff. On the trial, as the bill of exceptions shows, the plaintiff offered in evidence a deed for the lands executed to him by Mrs. L. A. Norton (formerly Bedwell) and her husband, dated January 17th, 1881; and a conveyance executed by W. C. White and wife to L. A. Bedwell, dated February 22d, 1864. The defendant "moved to exclude this evidence from the jury, the plaintiff having rested his case, because it was irrelevant, and showed no right in plaintiff to recover; which motion the court overruled, but stated that, if the motion was renewed after all the evidence was introduced, it would be considered; and the defendant then and there duly excepted." The defendants were the widow and son of L. C. Bedwell, deceased; and they adduced evidence showing that said L. C. Bedwell went into possession in the year 1870, or 1871, as the purchaser at a sheriff's sale under execution against one William Bedwell. Robert Bedwell, one of the defendants, while testifying as a witness for them, "was asked, whether the possession of said L. C. Bedwell and defendants was peaceable;" also, "whether their possession was uninterrupted," and "whether they claimed the land as their own." The bill of exceptions does not show that any objection was interposed to any one of these questions, nor does it state the answers of the witness; the only recital being, "plaintiff objected to the answer, on the ground that the question called for a conclusion of the witness;" which objection was sustained by the court, and exception reserved by the defendants. The plaintiff offered in evidence, in the subsequent progress of the trial, the deposition of said W. C. White, taken on interrogatories and cross-interrogatories, "to which the defendants objected, on the several grounds set out therein;" but the bill of exceptions does not show the action of the court on the objection, nor any exception thereto. The court gave five charges in writing, "to which charges the defendants then and there duly excepted;" and the defendants then requested four charges in writing, "which the court refused to give, and the defendants then and there duly excepted."

The several rulings of the court on the evidence, the charges
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given, the refusal of the charges asked, and the overruling of a motion for a new trial, are now assigned as error.

Savage, Matthews & Daniel, for appellants.

J. L. Burnett, *contra*.

CLOPTON, J.—We are compelled to affirm the judgment, for the following reasons. Conceding that the conveyances from White and Mrs. Norton were irrelevant and inadmissible without further proof, the error was cured by the subsequent introduction of evidence tending to show their prior possession of the lands in controversy; the legal effect and sufficiency of the deeds to entitle the plaintiff to recover being dependent upon the fact of possession, and the title of the defendants, as found by the jury on the entire evidence.—*Belmont C. & R. Co. v. Smith*, 74 Ala. 206; *Griffin v. State*, 76 Ala. 29.

In respect to the rulings of the court on the exclusion of evidence, the objections were made to the answers of the witness to certain interrogatories, no objection being made to the questions. The answers excluded are not set out in the record; and we have no means of ascertaining error *vel non* in their exclusion. We can not presume, in order to put the court in error, that the answers were legal evidence.—*Perry v. Danner*, 74 Ala. 485; *Allen v. State*, 73 Ala. 23. It is not shown that the exceptions to the interrogatories to the witness White were ever called to the attention of the court, or that the court made any rulings thereon. They can not be made for the first time in this court.

The exceptions to the instructions given and refused, are taken to them in mass, and are too general to avail the appellants, unless there is error in each of the charges given, and each of the charges requested asserts a correct proposition applicable to the evidence.—*Storall v. Fowler*, 72 Ala. 77. While there may be error in some of the instructions given, we can not assert there is error in each; and while some of the charges requested should have been given, each does not assert a correct proposition applicable to the evidence. An examination of them *seriatim* is unnecessary.

The refusal of the court to grant a new trial is not revisable by this court.—*Strong v. Cutlin*, 37 Ala. 706.

Affirmed.

[Graham v. Hughes & Hughes.]

Graham v. Hughes & Hughes.*Certiorari to Justice's Judgment, in matter of Claim Suit.*

1. *Statutory claim suit ; affidavit of claim.*—An affidavit of ownership by the claimant is the initial step in a statutory claim suit, without which the claimant has no standing in court, and his claim is properly dismissed.

2. *Revision of judgment on facts.*—The decision of the lower court, overruling and refusing a motion to substitute papers alleged to be lost, will not be disturbed by this court, unless clearly convinced that it is wrong.

APPEAL from the Circuit Court of Calhoun.
Tried before the Hon. LEROY F. BOX.

G. C. ELLIS, MATTHEWS & DANIEL, for appellant.

STONE, C. J.—The present case originated before a justice of the peace, in an attachment sued out by Hughes & Hughes against Murray, which was levied on cotton in the seed. Graham asserts that he has a just title to the cotton. Some proceedings were had before the justice, looking to a trial of the right of property, but precisely what was done is not clearly shown. The justice dismissed Graham's claim, and rendered judgment against him for costs. In *Walker v. Ivey*, 74 Ala. 475, we decided that a trial of the right of property could not be had, without a preliminary affidavit of claim. That, we held, was the initial step, without which jurisdiction of this statutory action is not given. If then there had been no affidavit of claim, Graham had acquired no standing in court, and the justice rightly dismissed his claim, independent of any reason he may have given for his ruling.

This case was then carried by *certiorari* to the Circuit Court, and the plaintiff moved to dismiss the cause out of that court, alleging as a ground that no affidavit of claim and bond for the trial of the right of property had been filed in the justice's court.—Code of 1876, § 3341, as amended by act approved February 1, 1879.—Sess. Acts, p. 76. Claimant then moved to be allowed to substitute affidavit and bond, alleging they had been given, and were lost. Testimony was offered before the court on this question ; some of it tending to show such affidavit and bond had been made and filed, and other parts of it that no such papers had ever been filed with the constable

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making the levy, nor with the justice before whom the attachment was pending.—Code, § 3676. The Circuit Court overruled the motion to substitute, and dismissed the cause, at Graham's cost; thus holding that the testimony failed to convince him the affidavit and bond had been filed with the justice of the peace. In thus finding on the testimony, we are not clearly convinced he erred.—*Nooe v. Garner*, 70 Ala. 443.

The judgment of the Circuit Court is affirmed.

Batton & Wife v. South & North Ala. Railroad Co.

Action against Railroad Company by Female Passenger, on account of Insulting Conduct of Strangers at Station.

1. *Duty of railroad company to protect passengers against violence and misconduct.*—Although it is the duty of a railroad company, as a common carrier, to protect its passengers, and especially female passengers, against violence or disorderly conduct on the part of its own agents and servants, other passengers, and strangers, when such violence or misconduct may be reasonably anticipated and prevented; yet it is not liable to an action for damages at the suit of a female passenger, on account of obscene and profane language, indecent exposure of the person, and other disorderly conduct by two or three intruders, who came into the waiting-room at the station while plaintiff was awaiting the arrival of her train, when it is not shown that the company had notice of any facts which justified the expectation of such an outrage.

APPEAL from the Circuit Court of Shelby.

Tried before the Hon. S. H. SPROTT.

The opinion in this case states all the material facts. On all the evidence adduced, which is set out in the bill of exceptions, the court gave a general charge in favor of the defendant, to which the plaintiffs excepted, and which they now assign as error.

WATTS & SON, OLIVER & OLIVER, for appellant.

THOS. G. JONES, *contra*.

SOMERVILLE, J.—The action is one of novel impression for which we nowhere find a precedent. It is a suit for damages against a common carrier—a railroad company—instituted by a passenger for the alleged negligence of the carrier in failing to protect the plaintiff, who was a female, and a single

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woman at the time of bringing the suit, against the nuisance of indecent language and conduct of certain unknown strangers, who proved disorderly in the presence of the plaintiff, while she was seated in the ladies' waiting-room of a railroad station, belonging to the road line of the defendant company. No assault on the plaintiff is shown, but only vulgar and profane language, and indecent exposure of person, and disorderly conduct, on the part of two or three intruders, who are in no wise connected with the defendant, as servants or agents.

It may be admitted that the plaintiff, Mrs. Batton, who, having married since suit was brought, unites with her husband in this action, was a passenger, inasmuch as she had purchased a ticket on the road, and had entered the waiting-room at the station, not an unreasonable length of time before the passenger train was due at Calera, *en route* for the place of her destination, which is shown to be the city of Birmingham.— *Wabash R. R. Co. v. Rector*, 9 Amer. & Eng. R. R. Cas. 264; *Gordon v. Grand St. R. R. Co.*, 40 Barb. (N. Y.) 546.

The nuisance complained of appears to have been an extraordinary occurrence, and one of which no officer or agent of the defendant company is shown to have been at the time cognizant, except a colored employee, or porter, whose duties were confined to looking after the baggage of the passengers.

The question thus presented is, whether it was the duty of the defendant to keep on hand a police force at the station for the protection of passengers against the insults or disorderly violence of strangers. If not, they would be guilty of no negligence which would render them liable in damages for breach of duty. The broad proposition is urged upon us, that it is the duty of railroad companies, when acting as common carriers, to use the utmost care in protecting passengers, and especially female passengers, not only from the violence and rudeness of its own officers and agents, but also of intruders who are strangers. We need not say that there may not be certain circumstances under which the law would impose such a duty. There are many well considered cases which support this view, but none of them fail to impose the qualification, that the wrong or injury done the passenger by such strangers must have been of such a character, and perpetrated under such circumstances, as that it might reasonably have been anticipated, or naturally expected to occur. In *Britton v. Atlanta & Charlotte Railway Co.*, 88 N. C. 536 (18 Amer. & Eng. R. R. Cas. 391; s. c. 43 Amer. Rep. 748), the rule is stated to be, that "the carrier owes to the passenger the duty of protecting him from the violence and assaults of his fellow passengers or intruders, and will be held responsible for his own or his servants' neglect in this particular, when, by the exercise of proper care, the acts

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of violence might have been foreseen and prevented; and while not required to furnish a police force sufficient to overcome all force, when unexpectedly and suddenly offered, it is his duty to provide ready help, sufficient to protect the passenger from assaults from every quarter which might reasonably be expected to occur, under the circumstances of the case and the condition of the parties." We may assume this to be the law for the purpose of this decision, as it seems to be supported by authority. *New Orleans Railroad Co. v. Burke*, 53 Miss. 200; *Pittsburg R. R. Co. v. Hinds*, 53 Penn. St. 512; *Pittsburg R. R. Co. v. Pillow*, 76 Penn. St. 510; *Goddard v. Grand Trunk R. R. Co.* (57 Me. 202), 2 Amer. Rep. 39; Cooley on Torts, 644-645; *Nieto v. Clark*, 1 Clifford. 145; *Putnam v. Broadway R. R. Co.*, 55 N. Y. 108.

In the case of the *Pittsburg Railway Co. v. Hinds*, 53 Penn. 512, *supra*, the plaintiff, who was a passenger, sued the defendant company for an injury received by her at the hands of a mob, who, defying the power of the conductor, entered the cars at a wayside station, and commenced an affray, which resulted in an injury to the plaintiff. It was held not to be the duty of the railroad companies to furnish their trains with a police force adequate to such emergencies; the court observing that "they are bound to furnish men enough for the ordinary demands of transportation, but they are not bound to anticipate or provide for such an unusual occurrence as that under consideration." "It is one of the accidental risks," said Woodward, C. J., "which all who travel must take upon themselves, and it is not reasonable that a passenger should throw it upon the transporter."

It can not be said that this duty of carriers, to take due care for the comfort and safety of passengers, is to be confined to the management of their trains and cars; for the better view is, that it extends also, in a measure, to what has been termed "subsidiary arrangements."—2 Rorer on Railroads, 951. They are bound to keep their stations in proper repair, and sufficiently lighted, and to provide reasonable accommodations for the passengers who are invited and expected to travel their roads.—*Knight v. Portland R. R. Co.*, 56 Me. 234; *McDonald v. Chicago R. R. Co.*, 26 Iowa, 124. The measure of duty is admitted by all the authorities, however, not to be so great as it is after a passenger has boarded the train, for reasons of a manifest nature.—*Baltimore & Ohio R. R. Co. v. Schwinding*, 8 Amer. & Eng. R. R. Cas. p. 552. *Note*.

We do not think that there is any duty to police station-houses, with the view of anticipating violence to passengers, which there are no reasonable grounds to expect. This is as far as the case requires us to go. The liability of a common

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carrier, when receiving a passenger at a station for transportation, ought not to be greater than that of an innkeeper, who is never held liable for trespasses committed ordinarily by strangers upon the person of his guests.—2 Kent Com. 593.* There is nothing tending to prove that the company had notice of any facts which justified the expectation of such a wanton and unusual outrage to passengers. Their contract of safe-carriage imposed upon the company no implied obligation to furnish a police force for the protection of passengers against such insults. It is shown neither to be commonly necessary or customary. It was a risk which was incidental to one's presence anywhere when travelling without a protector, and it was the plaintiff's risk, not the defendant's.

We discover no error in the rulings of the court, and the judgment must be affirmed.

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Action for Unlawful Detainer of Lands.

1. *Written demand of possession; secondary evidence.*—A previous demand in writing for the surrender of possession being necessary to the maintenance of an action for the unlawful detainer of lands (Code, § 3697), secondary evidence of such demand can not be received, until a proper predicate has been laid by notice to produce.

2. *Proof of prior possession; estoppel between landlord and tenant.* Actual prior possession by plaintiff is necessary to the maintenance of an action for unlawful detainer; yet, where the action is brought by a landlord, against his tenant holding over, the defendant is estopped from disputing the fact of such prior possession by plaintiff.

3. *Three years possession, as bar to action.*—The uninterrupted occupation of the premises by the defendant for three years before the commencement of the action, his estate not being determined, is a bar to the action (Code, § 3705); but a tenant holding over can not set up such three years possession as a bar, when he has paid, or promised to pay rent, during that period.

APPEAL from the Circuit Court of Shelby.

Tried before the Hon. S. H. SPROTT.

This action was brought by Robert E. Bolling, against Mrs. M. E. King, to recover the possession of a house and lot in the town of Calera, which, as the complaint alleged, the plaintiff had leased to the defendant for a term ending on the 10th January, 1882; and was commenced, before a justice of the peace,

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on the 21st February, 1882. On appeal to the Circuit Court, sued out by the defendant, the cause was tried on issue joined on the pleas of not guilty, uninterrupted possession by the defendant for three years before the commencement of the suit, and a plea denying that plaintiff ever had actual possession of the premises.

On the trial, as the bill of exceptions shows, the court allowed the plaintiff to adduce secondary evidence of a written notice, or demand for the surrender of the possession, which he had sent by mail, from Montgomery, to an agent in Calera, to be served on the defendant, and which said agent testified he had duly served; which evidence was admitted by the court, against the objections of the defendant, although there was no proof of any notice to the defendant to produce the original notice; and to these several rulings the defendant duly excepted.

The plaintiff adduced, also, evidence showing that, prior to the year 1880, defendant being indebted to him, and being seized and possessed of said house and lot, she and her husband conveyed it to him by mortgage as security for said debt; that this mortgage was foreclosed, by sale under the power therein contained, on the 10th July, 1880, plaintiff himself becoming the purchaser, through one Simpson, as his agent; that defendant and her husband executed an absolute conveyance to said Simpson on the said 10th July, 1880, and Simpson then conveyed to plaintiff; that he allowed the defendant to remain in possession, as his tenant, during the rest of the year 1880, at the agreed rent of \$10 per month; and that on the 21st January, 1881, defendant and her husband executed and delivered to him, or to his agent, their promissory note for \$72, payable on the 15th August, 1881, which was produced, and which recited that it was given "for rent on Calera house to January 10th, 1881." It was admitted, however, that all these transactions were conducted on plaintiff's part through an agent; "that he never was personally in possession of the premises, and never had been in actual possession, except through the defendant as his agent; and that the defendant had uninterruptedly occupied the premises, for more than three years before the commencement of this suit." On this evidence, the court charged the jury, "that if the defendant was in possession of the premises more than three years before the commencement of this suit, but was in possession during that time as the tenant of plaintiff, under a contract of lease, the time she was so in possession as his tenant should be excluded from said term of three years." The defendant excepted to this charge, and she now assigns it as error, together with the admission of the evidence to which she excepted.

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RICE & WILEY, for appellant.

E. P. MORRISSETT, *contra*.

SOMERVILLE, J.—In *Dumas v. Hunter*, 30 Ala. 75, it was decided that secondary evidence of the written demand and notice, required by the statute to the maintenance of an action of unlawful detainer, is inadmissible, without first laying a proper predicate for its introduction, by proof of notice to the defendant to produce. It was placed upon the ground, that the law required such notice to be in writing, and it constituted a precedent fact necessary to be proved before the action could be maintained.—Code, 1876, §§ 3697, 3700. While there is some doubt in our minds as to whether this ruling harmonizes entirely with the principle, that notice to produce is unnecessary where the writing to be proved is *itself* a notice, there are plausible reasons for the distinction made, and we adhere to the authority of the case. In view of this rule, the court erred in permitting oral evidence of the contents of the written demand and notice served upon the defendant, without first laying the usual predicate.

While the general rule is, that, in order to maintain an action of unlawful detainer, the plaintiff must show a prior actual possession of the premises sued for, mere constructive possession being insufficient; yet the principle is settled by this court, that where the action is instituted by a landlord against a tenant, for unlawfully holding over after expiration of his term, the tenant is estopped from disputing the fact of the landlord's actual prior possession, and he can not defend, therefore, by making proof of the fact that the plaintiff had merely a constructive possession.—*Beck v. Glenn*, 69 Ala. 121. The present action was maintainable, without showing that the plaintiff had gone into actual possession of the premises after his purchase from defendant. The possession of the tenant was in right of the landlord, and there had been a termination of his possessory interest.

Three years of possession by a tenant, who recognizes the tenancy by paying or promising to pay rent to the landlord, is clearly no bar to an action of this character, where the period of the tenant's lease is determined. Section 3705 of the Code bars such a proceeding only in a case where the defendant has remained in "the uninterrupted occupation" of the premises in controversy for the space of three years preceding suit brought, and his estate in the premises sued for remains undetermined. It thus requires the existence of three facts which do not concur in this case: 1st, an estate or interest claimed by the defendant; 2d, the continuance of this estate undeter-

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mined; 3d, uninterrupted occupation under such claim for three years. The merits of the title, or the nature of his estate, can not, of course, be inquired into on the trial.—Code, § 3704. It is sufficient if the plaintiff has been guilty of the neglect of enforcing his rights for three years under such a state of facts. Such is not the case here.

Reversed and remanded.

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Mandamus to Probate Judge, refusing to grant License for Retailing Spirituous Liquors.

1. *Judicial notice of legislative journals.*—The courts take judicial notice of the journals kept by the two houses of the General Assembly, and are authorized to search them for the purpose of ascertaining whether a particular statute, included in the printed volume published by authority, was enacted in accordance with the forms prescribed by constitutional provisions.

2. *Variance between approved (or enrolled) and original bill.*—A material variance, in substance and legal effect, between the enrolled bill which was signed by the governor, and the bill which actually passed the General Assembly, as shown by the journals of the two houses, is fatal to the validity of the enactment as a law.

3. *Same; Revenue Law of Feb. 23d, 1883.*—The revenue law approved February 23d, 1883, as signed by the governor, imposed a tax on "all money loaned and solvent credits, or credits of value" (Sess. Acts 1882-3, p. 71, § 5, subd. 7), without any deduction of the tax-payer's indebtedness, while the bill which actually passed the two houses of the General Assembly, as shown by their journals, contained a clause expressly authorizing such deduction, and taxing the surplus only; and this variance destroys the validity of the entire enactment. (STONE, J., doubting.)

4. *General Assembly; length of session under constitutional provisions.* The constitutional provision limiting the sessions of the General Assembly to fifty days (Art. IV, § 5) has been construed by successive legislatures to mean fifty legislative working days, excluding Sundays and other days on which, by concurrent resolution, the two houses do not sit; and the court adopts this construction.

APPEAL from the City Court of Montgomery.

Tried before the Hon. THOS. M. ARRINGTON.

This cause originated in an application by A. Moog, to Hon. F. C. RANDOLPH, judge of the Probate Court of Montgomery county, for a license to retail spirituous liquors within the corporate limits of the city of Montgomery, for and during the year 1883, on the payment of \$125 as the price of the license. The probate judge refused to grant the license, except on the payment of \$200, the price of a license as prescribed by the

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provisions of the law approved February 23d, 1883.—Sess. Acts 1882–3, p. 76, § 14. Thereupon, the petitioner applied to the judge of the City Court, for a *mandamus* to the probate judge, requiring him to grant a license as prayed; and on the hearing in that court, the following facts were agreed on, “as a statement of the facts upon which the case is to be decided.”

(1.) “That defendant refused to issue the license prayed for, under the authority of the act of the General Assembly approved February 23d, 1883, entitled ‘An act to levy taxes for the use of the State and the counties thereof,’ which appears in the printed publication of the laws of 1882–3; and because by the provisions of that act (section 14, subdivision 3), the price of a license for retailing spirituous liquors, in cities and towns containing over 5,000 inhabitants, is made \$200 for the State, while the petitioner tendered only \$125, the price of a license under the Code of 1876.” (2.) “That the city of Montgomery, in which the petitioner proposed to do business, contains over 5,000 inhabitants; and, under the charter of said city, all persons doing the business in the city, for which the petitioner applied, are exempt from the payment of any license to the county.” (3.) “That the said act of February 23d, 1883, above referred to, as appearing in the printed publication of the laws of 1882–3, in all things agrees with, and conforms to the act which passed both houses of the General Assembly, and was approved by the governor, except that the journals of the two houses show that there was a disagreement between the two houses on an amendment to the 7th subdivision of the 5th section of said act; that a conference committee was appointed, and agreed upon a report amending said subdivision by inserting after the word ‘values,’ where it appears in the printed copy, these words: ‘from which credits the indebtedness of the tax-payer shall be deducted, and the excess only shall be taxed; but persons engaged in the business of borrowing and lending money shall not be allowed such deduction.’ Such report was made to each house, and was agreed upon and adopted by them; but, in enrolling said bill, by mistake of the enrolling clerk, the words above set out were omitted from the enrolled bill, and said bill, without these words, was signed by the presiding officers of the two houses, and approved by the governor.” (4.) “That the General Assembly met on the 14th day of November, 1882, and remained in session until the 12th day of December, 1882, when they took a recess until the 24th day of January, 1883, and adjourned *sine die* on the 23d February, 1883; and during said periods they held no session on any Sunday, nor on any Thanksgiving day, as proclaimed by the president and governor, nor on the 22d day of February, 1883, but regularly adjourned over each of these days, as shown by the journals of the two houses.”

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On these facts, as admitted and agreed on, the City Court refused a *mandamus*, and dismissed the petition ; and its judgment was assigned as error in this court.

The case was decided on the 12th April, 1883 ; but the opinion delivered by BRICKELL, C. J., was withdrawn by him, and the reporter has never been able to obtain a copy of it. The case is now published by order of the court.

SEMPLE & SON, for appellant.

H. C. TOMPKINS, Attorney-General, and P. HAMILTON, *contra*.

SOMERVILLE, J.—Since the decision of this court in the case of *Jones v. Hutchinson*, 43 Ala. 721, which was made at the June term, 1868, it may be regarded as a settled principle of law in this State, that the courts are authorized to search the records of the General Assembly, of which they are required to take judicial notice, so as to ascertain and declare whether a printed statute, purporting to be published under authority of the State, has, in truth and fact, been enacted according to the forms prescribed by the constitution. And, inasmuch as a *bill*, under the mandatory provisions of this instrument, can become a *law*, only when it has gone through all the forms made necessary to give it validity and force as such, the courts will pronounce it a *law*, or *not a law*, according as the legislative records may disclose a compliance, or failure of compliance, with these constitutional requirements.

I take it furthermore as a sound rule, also settled by our decisions, that if the bill which is *passed* by the General Assembly *varies materially, in substance and legal effect*, from that which is *approved* by the Governor—especially where this subject of variance involves a matter of amendment, without the incorporation of which in the bill one of the houses refused to concur with the other in its final passage—then there exists such a want of legal and actual identity between the bill passed and the one approved, as that *neither* of them acquires the force of a valid and constitutional enactment. In such a case, the bill passed by the General Assembly is not the one approved by the Governor, and the one approved by the Governor is, *e converso*, not the one passed by the General Assembly. The courts would be assuming too much, to presume that the same reasons which induced the one house to refuse to concur with the other, except on the condition of incorporating its amendment, might not likewise operate to induce the Governor to withhold his approval of the entire measure, without which it must have failed to become a law.—*Jones v. Hutchinson*, 43 Ala. 721 ; *Moody v. The State*, 48 Ala. 115.

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The question presented for our determination is, the influence which the application of this principle must exert upon the validity of an enactment of the late General Assembly, entitled "An act to levy taxes for the use of this State, and the counties thereof," approved February 23, 1883, and found on pages 67 to 83, inclusive, of the published Acts of that body, passed at the session of 1882-83. This enactment was approved by the Governor in the form in which it has been published, and in the exact form also in which it was *enrolled*. But it is materially variant, in substance and legal effect, from the bill which is shown to have been passed by the two houses of the General Assembly. The House Journal shows, that the enrolling-clerk omitted to incorporate in the enrolled bill, no doubt inadvertently, a material *amendment*, which was a component part of the complete bill as it passed these two legislative bodies. That this omission vitiates the entire bill, I think, there can be no room for doubt; provided the amendment itself, which is omitted, is not void for repugnancy to the constitution, on grounds which I shall hereafter discuss.

Let us suppose, for illustration, that the bill in its complete form, as it passed the two houses, had been signed by the presiding officers of these respective bodies, and had been presented to the Governor for his approval, and he had drawn his pen through this same amendment, and, after thus expunging it, had *approved the residue* of the measure, this being done as a condition precedent to affixing his signature. Would there not exist, in such a case, precisely the same difference in fact between the bill passed and that approved, as is here presented? The part *expunged* in the one case, and the part *omitted* in the other, being identical, the identity of the remainder is axiomatic. Could any one seriously contend, that the approval of a part of a measure, however honestly done in the conviction of its propriety, would operate to give any legal force to the part thus approved? And yet, where is the difference, in practical effect, between the two cases? The clear logic of the case lies in the axiom, that a bill is *an entirety*, and a law is the product of the combined, harmonious and unanimous action of the legislative and executive departments of government, each acting strictly within the scope of its constitutional authority, and according to the prescribed forms of the constitutional mandate. When, therefore, as we have said, the measure assented to by one of these departments is not, in substance and legal effect, the measure assented to by the other, but differs from it materially in its operation as a law, it is in no proper sense a constitutional or valid enactment.

In this case, we are not left to any mere conjecture as to the *materiality* of this difference between the two measures. The

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journals of the two houses show that the omitted amendment was a point of contention between these two bodies, and that the Senate refused to pass the bill as it came from the House, without amendment, in the acceptance of which the House concurred only after a modification of it, and through the conciliatory influence of a conference committee composed of members representing respectively the two dissenting bodies. After all, it must be remembered, the matter presented a mere legislative election between a new law, proposed to be enacted, as to the wisdom and policy of which the two houses were not in harmony, and an old one already on the statute-books for seven years past, which, with few changes, had met with the previous approbation of three successive General Assemblies.

The amendment under consideration was proposed and adopted as a part of subdivision 7 of section 5, as found on page 71 of the published Acts. We append this subdivision, and include in it the omitted amendment, designated by *italics*, for a more ready discrimination of its connection and bearing :

"7. All moneyed capital, that is, all money loaned and solvent credits or credits of value, *from which credits the indebtedness of the tax-payer shall be deducted, and the excess only shall be taxed; but persons engaged in the business of borrowing and lending money shall not be allowed such deduction,* and all money employed in the business of advancing or loaning on stocks, bonds, bullion, bills of exchange, or promissory notes, or in the purchase thereof, or in the discount of bills of exchange, &c., except when the money so employed is otherwise taxed as capital."—Acts 1882-83, p. 71.

It is insisted by the appellee's counsel, in support of the validity of the entire enactment, as published, that the *omission of the amendment from the enrolled bill was immaterial*, because, if inserted, it must have been pronounced unconstitutional and void—and for this reason, the bill as approved was *identical in legal effect* with the one that was passed by the General Assembly. Conceding the soundness of the latter proposition, in which I am disposed to concur, the question is presented as to whether this amendment is violative of any provision of our constitution, bearing on the subject of taxation. These constitutional clauses are as follows :

"All taxes levied on property in this State, shall be assessed in exact proportion to the value of the property."—Article ix, section 1; Constitution, 1875.

"The property of private corporations, associations and individuals in this State, shall forever be taxed at the same rate"—the only exception being institutions or enterprises devoted exclusively to religious, educational, or charitable purposes.—Art. ix, section 6, Constitution, 1875.

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It is settled that the general purpose of these clauses is to establish an *ad-valorem* system of taxation, thus exacting a certain kind of uniformity in the rules of taxation, as applied to the property of all persons, whether private or official, Sections similar in phraseology and signification, are found in the constitutions of some of our sister States. Their object has been construed to be, to secure, as far as practicable, that equality in bearing the just burdens of government, which has become a distinguishing characteristic of the American States, and has been well denominated the corner-stone of Anglo-Saxon liberty. These clauses have never been construed to exact the taxation of all property, of every description, in the State, at precisely the same rate of taxation, without regard to its peculiar nature, uses, or other characteristics. Nor can they any more be interpreted to prohibit exemptions from taxation, or such *classifications of property*, as are not purely arbitrary, capricious, or without the semblance of reason.—*Clark & Murrell v. Port of Mobile*, 67 Ala. 217; *Mayor of Mobile v. Stonewall Ins. Co.*, 53 Ala. 570; Cooley's Const. Lim. 515; Burroughs on Tax. pp. 65-69, sections 53, 54. As observed by Judge Cooley, "It is difficult to conceive of an exemption law which selects single individuals or corporations, or single articles of property, and, taking them out of the class to which they belong, makes them the subject of capricious legislative favor. Such favoritism could make no pretense to equality; it would lack the semblance of legitimate tax legislation." Cooley on Tax. 153, 183; *Howell v. Bristol*, 8 Bush, 493.

There is a clear line of demarcation between the *taxing power* of a government, and the *right of eminent domain*, which is not properly distinguished in many of the adjudged cases, thus sometimes tending to confusion. Taxation is the just proportion of the citizen's share or contribution to the support of the government, while eminent domain involves the idea of a forced contribution, beyond, or in excess of his share.—Burroughs on Tax., sec. 6; *People v. Mayor of Brooklyn*, 4 N. Y. 424. The legitimate taxing power is not at all abridged by the constitutional restriction, providing that private property shall not be taken for public use without just compensation; this limitation being generally construed to have reference strictly only to the power of eminent domain.—Pomeroy on Const. Law, 160, sec. 251. Yet it is manifest that the confiscation of the citizen's property can not be legalized by calling it taxation, and that taxation ceases to be such when it becomes spoliation. The legislature would have no power, under the device of a *classification*, to tax the property of all Jews or Israelites, at a rate greater than that of other citizens; nor to say that others should be exempt from paying taxes because of

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their peculiar religious tenets, or of the color of their hair. Such legislation would constitute shameless infractions of that familiar maxim, which Lord Coke declared to be the pride of the English law—*Lex uno ore omnes alloquitur*.—2 Inst. 184.

These principles are announced, in order that we may not be misunderstood. The paramount difficulty is, as to *when* the courts can properly interpose to declare a statute void, because of its taxing a particular class of property, upon a principle which seems to violate the rule of relative uniformity designed by the constitution. "It is only when statutes are passed," says Baggelow, C. J., in *Com. v. Savings Bank*, 5 Allen, 436, "which impose taxes on false and unjust principles, or operate to produce gross inequality, so that they can not be deemed, in any just sense, proportional in their effect on those who are to bear the public charges, that courts can interpose, and arrest the course of legislation by declaring such enactments void."

This proposition, in my opinion, is correct, in a modified sense; but there can be no excuse for the interference of the courts, unless this inequality—whether manifest by a system of exemptions or classifications—is *not only oppressive in its operation*, but is *so glaring as that it can be judicially declared to be founded on arbitrary and capricious principles, without the just semblance of reason*. In such a case, the system would cease to be taxation, and become governmental spoliation; thus trespassing on the boundary line of eminent domain, which is a right that can not be exercised under the provisions of our constitution, without first paying to the citizen a just compensation for his property taken by the State.—*New Orleans & Selma R. R. Co. v. Jones*, 68 Ala. 48. No law can be upheld, which carries on its face the patent fact that its intention was confiscation under the guise of taxation.—Cooley on Tax. 128. Where the precise line of distinction exists, is often a question of great complexity, and of difficult solution. Neither any fixed rule of reason, nor the authorities furnish us any definite or clearly defined principle upon which to settle an accurate rule for all cases.—*S. & N. Railroad Co. v. Morris*, 65 Ala. 193; *State v. Indianapolis*, 69 Ind. 375 (s. c., 35 Amer. Rep. 223); *Knowlton v. Supervisors*, 9 Wis. 410; Burroughs on Tax. p. 32, sec. 34; *Wells v. City of Weston*, 22 Mo. 385; *State v. Fosdick*, 21 La. Ann. 434; *In matter of Town Flatbush*, 60 N. Y. 398; *State v. Ogden*, 10 La. 402.

Subject to the above limitation, I do not see how the courts can circumscribe the legislative power to select the proper subjects of taxation, and to classify them upon principles which to them seem just. There must, of necessity, be left a liberal scope for the free exercise of this presumably wise discretion. It is said by Judge Cooley, in his work on Constitutional

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Limitations: "The constitutional requirement of equality and uniformity only extends to such subjects of taxation as the legislature shall determine to be properly subject to the burden. *The power to determine the persons and the objects to be taxed, is trusted exclusively to the legislative department*; but over all these objects the burden must be spread, or it will be unequal and unlawful as to such as are selected to make the payment."—Cooley Const. Lim., 5th Ed., p. 638 (515). There no doubt may be cases, where the regulation as to assessments would be so unequal, as to be obnoxious to the constitutional rule of uniformity.—*Pollard v. The State*, 65 Ala. 628. But all that can be required is such regulation as shall secure a fair and just valuation.—*Louisville R. R. Co. v. The State*, 25 Ind. 177.

I am quite free to admit that the question under consideration is involved in both difficulty and doubt. For the purposes of this discussion it may be conceded, without in any wise affecting this question, that the last clause of the amendment—providing that "*persons engaged in the business of borrowing and lending money shall not be allowed such deductions*"—is objectionable on constitutional grounds—a point that we need not decide—and yet the remainder of the amendment would not necessarily fall, but might stand unaffected by the vitiated part; and the question would still recur, *Can the General Assembly constitutionally authorize the indebtedness of the taxpayer to be deducted from his solvent credits, or credits of value*, which they have made a new and proper subject of taxation.

The purpose and effect of the law, it may be argued with much force, is not so much to tax the credits themselves specifically and *eo nomine*, as the *surplus* of the credits over and above the tax-payer's indebtedness; or, in other words, the difference between the debts due *to* and *from* the tax-payer, which is made by the sovereign legislative power a *new subject* of taxation. It has never been doubted that the legislature may tax one's net income, which is another name for the surplus of his gross receipts over and above the proper expenses incurred in earning it. So, it would probably have the power, as in some States it is often the practice, to tax property upon the basis of a valuation fixed by deducting mortgage-liens, or other like incumbrances, from the cash market value; and this rule of assessment has never been adjudged to violate, so far as we are aware, that equality and uniformity in the rate of taxation, which is required by the constitution. Can we say that there is no such just connection between what a man *owns* in his proper right, and what he *owes* to others, as that it is beyond the scope of legislative sovereignty to set off the one against the other,

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in the adjustment of his revenue liabilities to the State? It is a familiar maxim, that courts of equity will consider that as done which ought to be done. Why, it may be inquired, can not this just maxim of equity jurisprudence be made to constitute the vital spirit, if not the actual basis, of legislative action, in matters of taxation and of the public revenue? According to the teaching of the soundest morality, the debtor is but a mere *trustee*, holding his effects in trust for the benefit of his creditors. Hence, one of the highest duties of every debtor, exacted alike by all laws, human and divine, is to pay his pecuniary obligations. For the enforcement of this moral and legal duty, the rules of the common law authorized the body of the debtor to be taken under execution; and, under the ancient provisions of the Jewish code, he could, at the option of the creditor, be sold into the bondage of involuntary servitude. Under our laws, the collection of debts can be enforced by many summary remedies, and the sanctity of their obligation is forbidden to be violated by any power of the State. The creditor can, by the process of garnishment, at any time fasten a lien upon the solvent credits of the debtor, a species of assets recognized by law as being peculiar in their nature. They are more readily converted into money than any other kind of property, and, in the traffic of commerce and the common business transactions of life, often passing as money. The one is money in hand, and the other is money due. Paper money itself, in a broad sense, is a solvent credit due by the bank to its bill-holder. These facts are pertinent, as illustrating the nature of this new subject of taxation, and of the equity of the whole plan of assessment, which, with its qualified exemptions, is sought to be graduated according to the tax-payer's pecuniary ability to contribute to the support of the government. It is suggestive, too, of the reasonableness of its separate *classification*, in the revenue system of the State. This system, it is true, does not operate with perfect equality,—a feature of taxation which is admitted by all to be unattainable. Practical approximation is all that can be expected, and, perhaps, all that is desirable. There is a relative uniformity, however, in its operation. He who is not indebted to-day may become so to-morrow. This uniformity is similar to that of the Federal Bankrupt Law, of 1867, which preserved in force the debtor's exemptions as they severally existed under the different laws of the various States, at a fixed and uniform time. These exemptions, though not exactly alike perhaps, in any two of the thirty-eight States of the Union, were adjudged not to be repugnant to the mandate of the Federal constitution, requiring the passage of a *uniform* bankrupt law throughout the Union.—Bump on Bank., 8th Ed. pp. 147, 509.

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These considerations make us unwilling to declare that the amendment under review is violative of that uniformity of taxation required by sections 1 and 6 of Article XI of the State constitution. This view is strengthened by the doctrine, now considered as settled by the past decisions of this court, that the General Assembly of this State has the same unlimited power of legislation that resides in the British Parliament, except so far as that power may be restrained by the limitations of the constitution, Federal and State.—*Davis v. The State*, 68 Ala. 58; *Dorman v. The State*, 34 Ala. 216.

The point for decision, therefore, may be considered to belong to that class of doubtful cases which permits for its solution the invocation of the doctrine of *legislative construction*. The principle has often been declared, that constitutions are to be construed in the light of previously existing constitutions, and that a uniform legislative interpretation of a doubtful clause, running through many years, is of weighty consideration with the courts, as is also the contemporaneous exposition of the bar. The maxim, *contemporanea expositio est fortissima in lege*, is an accepted canon of judicial construction.—*Ex parte Hardy*, 68 Ala. 303; *Ex parte Selma & Gulf R. R. Co.*, 45 Ala. 696; Sedw. Stat. Law, 252. As we have said, the main clause of the present constitution, now under consideration, was found in the constitution of 1868. — Const. 1868, Art. ix, sec. 1. The legislature, on February 19, 1867, prior to the constitution of 1868, had passed a revenue law taxing “all solvent credits bearing interest,” from which credits “the indebtedness of the tax-payer” was required to be deducted, “the excess only being taxed.”—Acts 1866-67, p. 232, chap. ii, sec. 2, subd. 4. The first legislature, meeting under this constitution, preserved this same clause in a revenue law enacted by it in the year 1868.—Acts 1868, p. 301, sec. 6, subd. 20. The same provision was contained in the revenue system adopted in March, 1875, a slight change only being made in its language, by adding to the phrase “solvent credits” the words “credits of value,” thus showing that the attention of the law-making power was specially directed to the subject. Acts 1874-75, p. 7, sec. 6, subd. 19. At the December term of this court, in the same year, the case of the *Ala. Gold Life Ins. Co. v. Lott*, 54 Ala. 499, was decided, in which the question arose, as to whether or not the appellant was entitled to a deduction claimed to fall within the influence of this particular clause. While it was a disputed question as to whether solvent credits could be selected as a legitimate subject of taxation, the right of deducting the indebtedness of the tax-payer does not appear to have been even clouded with a doubt. The deduction was allowed, which could not have been done unless

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the law in question was deemed constitutional. It is true that this decision can not be technically considered as an authority on this point, but it is cited to show a judicial acquiescence in the legislative construction. The constitutionality of a law, under which a litigated right is sought to be derived, is a question always before the court, whether presented by argument or not. It need never be specifically assigned as error, under the rule regulating such assignments upon the record. The tacit acceptance of a law, therefore, by the judiciary and the legal profession, is a part of its contemporaneous exposition.

The constitution of 1875, containing the same provision as that of 1868, which exacted the assessment of taxes in exact proportion to the value of property, went into effect in December of the year 1875. The members of the convention who adopted it were composed largely of the members of the various General Assemblies that had framed those revenue laws, extending back through the past decade of years. It was adopted with a knowledge of its previous exposition. And since that time every revenue system adopted by each subsequent and successive General Assembly has contained a clause taxing solvent credits, and authorizing a deduction of the taxpayer's indebtedness—thus taxing, as in this case, the *surplus of his solvent credits over his indebtedness, as a newly created subject* elected to bear its proportionate burden in raising the public revenue.—Acts 1875-76, pp. 46-47, sec. 1, subd. 8; Acts 1876-77, p. 4, sec. 2, subd. 3.

The conclusion which we have above reached is fortified, to some extent, by a recent decision of the Supreme Court of Indiana, a State whose constitution has been construed to establish a system of strictly uniform taxation, excluding the operation of laws exempting any property from taxes, except such as is specially designated by its provisions. In the case of *Matter v. Campbell*, 71 Ind. 512, a law was sustained as valid which taxed "the total amount of all credits" belonging to the taxpayer, "*less his bona fide indebtedness.*"

In view of these facts, we scarcely feel authorized to conclude, that, if the amendment under discussion had been incorporated in the enrolled bill, and been approved with the remainder of the law by the Governor, it could have been adjudged a nullity, as violative of the constitution. Its omission from the law was, therefore, material, and, under the principles first decided, the entire act was vitiated, because it never passed through the mandatory forms prescribed by the constitution for the enactment of a valid constitutional law.

I fully concur with the Chief-Justice in the views expressed by him as to the proper construction of section 5, of Article iv, of the present Constitution, fixing the time during which the

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General Assembly is permitted to remain in session. I am satisfied that "fifty days" mean fifty legislative *working days*, exclusive of the Sundays, and other days upon which the Senate and House concur in refusing to sit by joint resolutions of adjournment. This question has been repeatedly considered by the judiciary committees of the Senate and House of Representatives, at successive sessions of the General Assembly, since the adoption of the Constitution; and their reports, concurring in this view, have in each instance been adopted by those bodies. Even if we regarded the question a doubtful one, we would hesitate to depart from this settled legislative construction of the fundamental law, especially in view of the serious consequences which would necessarily flow from it. The right to adjourn *ad libitum*, upon certain week days, and the right to *draw pay* for such days, are questions not necessarily dependent, the one on the other. The power to adjourn may exist, without the right to draw pay; and they are not convertible or correlative powers, as has been argued before us at the bar. This suggestion is not intended to cast any doubt upon previous decisions of this court, holding that the members of the General Assembly are entitled to draw their *per diem* pay on Sundays—a view in which we all fully concur.

Under the influence of these conclusions, it necessarily follows that the judge of the City Court erred in refusing to grant the prayer of the petitioner asking for the writ of *mandamus*.

STONE, J.—I concur in the opinion, that the section of the revenue law, the subject of contention in this suit, is inoperative, but I doubt the correctness of my brothers' views, in holding it vitiates the whole statute.

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Certiorari to County Board of Revenue.

1. *Variance between approved (or enrolled) and original bill.*—In the act providing for the assessment and collection of taxes, and defining the duties of the officers engaged in the assessment and collection, approved February 23d, 1883, the 57th section, as approved by the governor, required the tax-collector to give notice of his appointments in each precinct, by publication in a newspaper, "or by bills posted at five or more public places," while said section of the bill passed by the General Assembly, as shown by the journals of the two houses, required notice by

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publication "and by bills posted," &c.; and this variance destroys the validity of the entire enactment. (STONE, J., doubting.)

2. *General Assembly; length of session under constitutional provisions.* The constitutional provision limiting the sessions of the General Assembly to fifty days (Art. IV, § 5) has been construed by successive legislatures to mean fifty working days, excluding Sundays and other days on which, by concurrent resolution, the two houses do not sit; and the court adopts this construction.

APPEAL from the City Court of Montgomery.

Tried before the Hon. THOS. M. ARRINGTON.

In the matter of the assessment of escaped taxes on money loaned, &c., made by C. T. Pollard, as tax-collector of said county, against Calvin L. Sayre. Sayre denied the authority of the tax-collector to make the assessment, and took an appeal to the Board of Revenue; and that body having sustained the regularity and legality of the assessment, he removed the proceedings, by *certiorari*, into the City Court. The City Court sustained and affirmed the decision of the Board of Revenue, and its judgment was here assigned as error. The case was decided in April, 1883.

H. C. TOMPKINS, for appellant.

W. S. THORINGTON, GEO. F. MOORE, SMITH & MACDONALD, and GEO. M. MARKS, *contra*.

STONE, J.—The foregoing opinion was delivered April 12th, 1883, after oral argument was heard on the question then presented. The only question discussed and considered on that hearing, was the proper construction of the second *proviso* to section 143 of the act "to provide for the assessment and collection of taxes," &c.—Pamph. Acts 1882-3, p. 83. The construction then given to that *proviso* led to a reversal of the ruling of the City Court, which was then announced. On that hearing, no question was raised as to the correct enrollment of the bill, as it passed the two houses of the General Assembly. From aught we then knew, or had heard, the enrolled bill, as it received the approval of the Governor, was a correct copy of the bill as it received the sanction of the two houses of the legislature.

A rehearing has been granted, and it is now shown that an error was committed in the enrollment, by which section 57 of the bill, as approved by the Governor, is substantially different from the same section, as agreed on and enacted by the two houses of the legislature. This, under the ruling of a majority of the court in *Moog v. Randolph*, at the present term, is fatal to the whole bill; and, as a consequence, the bill, generally known as the "Machinery Law," never became a law. And

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while I am not able to concur in the conclusion that this error should defeat the whole act, considering it in the light of other constitutional rulings on what I consider a kindred question, there is much plausibility in their reasoning. If the question were *res nova*, I can not say I would not agree with them.

The other question urged in this cause—namely, that the session had expired before this statute was enacted—was decided adversely to the appellee in the case of *Moog v. Randolph*, at the present term.

The judgment of the City Court is affirmed.

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Petition to set aside Judgment of Special Supreme Court.

1. *Supreme Court ; conclusiveness of decision on lower court.*—A decision of the Supreme Court, duly entered of record, and properly certified to the court from which the appeal was taken, is conclusive on that court, and can not be there assailed on account of errors or defects which do not render it void on its face; the only remedy being by petition, or other appropriate proceeding, in the Supreme Court.

2. *Same ; power over judgment after expiration of term.*—The Supreme Court can not set aside a judgment or decree rendered by it, after the expiration of the term at which it was rendered, unless the same is void on its face.

3. *Special Supreme Court.*—When two of the justices of the Supreme Court are disqualified to sit in a cause, the parties may consent, by agreement entered of record, that the case shall be submitted to the decision of the remaining justice, and that his decision shall be entered up as the decision of the court; or that two attorneys of the court, named in the agreement, shall be associated with him, and that the decision of the three, or a majority of them, shall be entered up as the judgment of the court; and if one of the attorneys so selected dies before judgment is rendered, the decision of the justice and the surviving attorney, afterwards rendered, and regularly entered up as the judgment of the Supreme Court, is valid and binding on the parties, and can neither be assailed in the court below, to which the cause is remanded by judgment and certificate regular on their face, nor in the Supreme Court after the expiration of the term at which it is regularly entered.

APPEAL from the Chancery Court of Limestone.

Heard before the Hon. THOS. COBBS.

In this case, STONE, C. J., and CLOPTON, J., were incompetent to sit, having been of counsel; and the case was thereupon certified by SOMERVILLE, J., to the Governor, who appointed JNO. M. MCKLERoy and THOS. SEAY, attorneys of the court, to sit with Judge SOMERVILLE as a special court. The statute authorizing such special court is in these words: "When any

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two of the judges of the Supreme Court are interested, or disqualified to sit in any cause or causes pending in the court, the remaining judge shall certify the fact to the governor; and thereupon the governor shall commission two members of the bar of the Supreme Court, and the persons so appointed, with the judge of the court who is competent to sit, shall compose the Supreme Court for the trial and decision of such causes, with all the powers, privileges and duties of the Supreme Court of this State."—Code, § 576. The opinion states all the material facts. The case is published by instructions from the Supreme Court.

THOS. H. WATTS, HUMES, GORDON & SHEFFEY, and L. COOPER,
for the appellant.

CABANISS & WARD, *contra*.

JOHN M. MCKLEROY, Special Judge.—This is an appeal from a decree of the Chancery Court, refusing to declare null and void a mandate certified to it by the clerk of the Supreme Court, as the judgment of the Supreme Court in the case of *Hamilton v. Donnell*, and to vacate its own proceedings to final decree pursuant to said mandate.

The original bill of *Hamilton v. Donnell* was dismissed by the Chancery Court, on February 10th, 1874. An appeal was taken by complainant to the Supreme Court, on May 4th, 1875. Two of the judges of the Supreme Court were disqualified to sit in the case, and the parties selected Messrs. JNO. A. ELMORE and HENRY C. SEMPLE, attorneys practicing in the court, to sit with Judge MANNING, the only competent judge, and to hear and decide the cause. The agreement was in writing, and entered of record; and it provided that the decision of a majority of said parties, sitting and hearing the cause, should have the same force and effect as the decision of the Supreme Court duly and legally organized.

The cause was submitted to them for decision, on July 13th, 1877. Mr. ELMORE died in 1878. Judge MANNING and Mr. SEMPLE decided the cause, on the 12th day of June, 1879, reversing the decree of the Chancery Court, and remanded the cause for further proceedings in the court below. Their decision was duly entered as the judgment of the Supreme Court in the cause, and as such was duly certified to the Chancery Court. The Chancery Court rendered another final decree in the cause, on October 6th, 1880, and from this decree Mrs. Donnell prosecuted an appeal to the Supreme Court; and by that court the decree of the chancellor was affirmed on 11th October, 1881. Nearly two years afterwards—on 20th Septem-

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ber, 1883—the bill, or petition in this cause was filed, seeking to declare null and void the decree rendered by the Supreme Court on June 12th, 1879, and to vacate and annul all subsequent proceedings in the Chancery Court pursuant to said decree of the Supreme Court.

We think the chancellor was clearly right in denying the prayer of the petition. The appeal taken by complainant Hamilton, on May 4th, 1875, removed the cause from the Chancery Court into the Supreme Court. If the decree of the Supreme Court of June 12th, 1879, was void, then the cause was still pending in the Supreme Court, and the Chancery Court had no jurisdiction to make any order or decree in the cause, unless the said decree of the Supreme Court was void in its face. It does not seem to be void on its face; for it is duly entered of record as the judgment of the Supreme Court, and, as such, was duly and regularly certified to the Chancery Court. The Chancery Court can not question the validity of such a judgment. Sound public policy, as well as settled law, requires that the judgments and decrees of the court of last resort shall be conclusive on the inferior courts, from which appeals to it are taken. If the judgments of such supreme tribunal are wrong, or inherently defective, and not absolutely void on their face, the only remedy is by petition, or other appropriate proceeding in the supreme tribunal itself.—Bigelow on Estoppel, 3d ed., 22; *State v. Lane*, 4 Iredell, 434; *Roundtree v. Turner*, 36 Ala. 555; *Sturgis v. Rogers*, 26 Ind. 1.

The decree of the chancellor is affirmed.

A motion is also made in this court by appellant to vacate and annul said decree of this court, of June 12th, 1879.

This presents the question, whether this court can set aside its own judgment and decree, after adjournment of the term at which it was rendered. We think it can not do so, unless the judgment or decree which is sought to be set aside is void on its face. It is not void on its face. It is duly entered as the judgment of the Supreme Court, and the evident purpose of the parties, and the effect of the written agreement entered into by them, were, that it should be so entered. If for no other reason, it is conclusive and binding on the parties, as an agreed judgment.—Bigelow on Estoppel, 3d ed., 22; *Van Dyke v. State*, 22 Ala. 57; *Curtis et al. v. Gaines*, 46 Ala. 455; *Ex parte Madison Turnpike Co.*, 62 Ala. 93; 2 Brick. Dig. 141, § 150.

Aside from the fact that the judgment is regular on its face, and duly entered of record, when looking at all the facts connected with its rendition, it seems to us that it is conclusive on the appellant. It is not denied that the Supreme Court had

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jurisdiction both of the subject-matter involved, and of the parties. But it is insisted that the decision is not that of the court, because only one of the judges of that court, and Mr. SEMPLE, who was not a member of the court, exercised judicial mind in its determination. It is true that, if two of the judges of the Supreme Court are disqualified from sitting in a cause, the remaining judge can not, without consent of the parties, proceed alone and render a valid judgment in the cause. But the parties may waive the disqualification of the other judges (Code, § 540), or they may consent for the single qualified judge to decide the cause, as was done in the case of *Bullard and Wife v. Lambert*, 40 Ala. 204, and as it seems was done in this very case on the second appeal to the Supreme Court. Freeman on Judgments, 3d ed., § 147; *Walker v. Ryan*, 1 Wis. 597. If, then, it was competent for the parties to have submitted the cause to Judge MANNING alone, and if his judgment would have bound them, we can not see that the fact that Mr. ELMORE and Mr. SEMPLE, who were learned and experienced attorneys of the court, sat with Judge MANNING, and counselled with him about the case, rendered it any the less valid; and especially so, when these outside parties were called into the case, at the instance and for the convenience of the parties themselves, and their counsel and co-operation was accepted by Judge MANNING, and permitted by him and the other members of the court, purely as matter of courtesy to the parties.—*Ala. & Fla. R. R. Co. v. Burkett*, 42 Ala. 83. Mr. SEMPLE was certainly, *pro hac vice*, a *de facto* judge of the Supreme Court.—*State v. Carroll*, 9 Amer. Rep. 429.

Suppose none of the judges had been disqualified, and the parties had presented to the court, and had entered up as the judgment of the court, what they had themselves agreed upon as the judgment, or an award which had been made for them by outside parties, not judges, nor even attorneys, but which they had consented should be entered as the judgment of the court; can it be that one of the parties could afterwards come into the court, and have such judgment set aside as void, because it was not in fact the independent judgment of the court? Such conduct would be trifling with the court, and in direct conflict with that salutary principle upon which the doctrine of estoppel rests.

The appellant must be held to be estopped from disputing the validity of the judgment in this case.

We can not see that there is any hardship in this; for the decision was made by those who were selected by the parties for the very purpose, and, on this motion, we can indulge only the presumption that the decree so rendered by them was just and correct. But, if it was otherwise, appellant must remember

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that such result was produced by her own voluntary act ; without such consent on her part (for it is not denied that her solicitor had authority to bind her in the premises), it would not, and could not have been brought about.

We think it is immaterial that the decision was made by Judge MANNING and Mr. SEMPLE after the death of Mr. ELMORE. The written agreement provided, that a “decision *of a majority* of them shall have the same force and effect as the decision of the Supreme Court.” It was the decision of a majority of them, and it is useless to speculate as to what might have been the effect of Mr. ELMORE had survived.

The motion is denied.

INDEX.

ACCOUNT.

1. *Account rendered ; evidence as to items.*—An itemized account for cotton sold and shipped by defendant to plaintiffs, on which he claimed a balance due him, and pleaded it as a set-off, having been furnished by him to them, as he testified, and retained by them without objection to the weights of the cotton as therein specified ; that portion of the account can not be excluded as evidence, on motion, because defendant further states that he did not himself weigh the cotton, but that the weights were furnished to him by the public weigher. *Sloan & Son v. Guice, 394.*
2. *Account stated, or settlement ; conclusiveness of.*—An admission of the correctness of an account rendered, whether express, or implied from its retention without objection within a reasonable time, is not conclusive, but may be disproved by satisfactory proof of mistake ; though, when a settlement has been made, and it is afterward sought to re-examine and surcharge or falsify the account, fraud must be shown, as a general rule, or gross mistake in the reckoning. *Ib. 394.*

ACTION.

1. *Action against judicial or ministerial officer.*—A civil action does not lie against a judge, for doing, or omitting or refusing to do, an official act in the exercise of judicial power ; but, if he is also charged with the performance of ministerial duties, he is responsible to any person specially injured by the manner in which he performs them, or by his neglect or refusal to perform them, and his judicial character does not protect him. *Grider v. Tally, 422.*
2. *Same ; what acts are judicial, and what ministerial.*—Judicial power is authority to hear and determine, where the rights of persons or property, or the propriety of doing an act, is the subject-matter of adjudication, and a judicial act involves the exercise of judgment or discretion ; but, where the law enjoins a duty, prescribing and defining the time, manner and occasion of its performance, with such certainty that nothing remains for judgment or discretion, the duty and the act each is ministerial. *Ib. 422.*
3. *Same ; granting or refusing license to retail spirituous liquors.*—In granting or refusing a license to retail spirituous liquors, a probate judge acts ministerially, not judicially ; and an action lies on his official bond, if he improperly refuses to issue a license to an applicant who has fully complied with all the statutory requisitions. *Ib. 422.*
4. *Action by winner at raffle, or lottery.*—The winner at a raffle can not maintain an action against the person who has the possession of the article, until there has been a constructive delivery to him, by

ACTION—*Continued.*

- which the legal title would be vested, and all inquiry into the illegality of the transaction would be precluded; but, if the defendant, holding possession as bailee for the winner, denies plaintiff's right to recover because he does not produce the winning ticket, plaintiff is entitled to recover on proof of the loss of the ticket and his ownership of it. *Koppersmith v. Nassano*, 385.
5. *Action for money had and received, for surplus proceeds of sale in hands of sheriff.*—An action for money had and received is, to some extent, an equitable action; and it may be maintained by a married woman, against the sheriff, to recover the surplus proceeds of sale of lands conveyed to her by her husband by deed of gift, which were afterwards sold under an execution against him having a prior lien, although the deed created in her only an equitable estate in the lands. *Seals v. Holloway's Adm'r*, 344.
 6. *Action against new municipal corporation, on judgment against predecessor.*—Held, on the facts of this case, that an action lies against *Selma*, a municipal corporation, on judgment rendered against *City of Selma*, its predecessor. *Amy & Co. v. Selma*, 103.
 7. *Action by landlord, against purchaser of tenant's crop.*—An action on the case lies in favor of the landlord, against one who, having knowledge or notice of the landlord's statutory lien, purchases from the tenant the crops grown on the rented lands, and removes or converts them, whereby the lien was lost or destroyed. *Thompson v. Powell*, 391.
 8. *Action for damages, by mortgagee of crops; against landlord with prior lien.*—A mortgagee of crops grown on rented lands may maintain a special action on the case against the landlord, who, having notice of the mortgage, seized and sold the entire crop under his prior lien for rent and advances, the proceeds of sale exceeding the amount of his claim; and is entitled to recover the excess. *Hamilton v. Maas & Brother*, 283.
 9. *Action between innocent sufferers by wrongful act of third person.* Application of principle between vendor of goods and innocent sub-purchaser from fraudulent vendee.—*Spira v. Hornthall, Whitehead, Weissman & Co.*, 137.
 10. *Injuries caused by traps and pitfalls; liability of owner for damages.* All persons, whether natural or artificial, who own lands on which the public is invited, expressly or impliedly, to enter, are bound to keep such lands free from traps and pitfalls, and are liable in damages at the suit of any person injured by the neglect of this duty; but the principle does not extend to places which are strictly private, or to which the public is neither invited nor expected to go. *M. & E. Railway Co. v. Thompson*, 448.
 11. *Same, as applied to railroad companies.*—All the property of a railroad company, including its depots and adjacent yards and grounds, is its private property, on which no one is invited, or can claim a right to enter, except those persons who have business with the railroad; which class embraces, not only passengers, but protectors and friends attendant on their departure, or awaiting their arrival. *Ib.* 448.
 12. *Same.*—To the class of persons thus having business, the railroad company is under obligation to keep in safe condition all parts of its platforms, with the approaches thereto, to which the public do, or would naturally resort, and all portions of the station-grounds reasonably near to the platform, where passengers would be likely to go, and to provide safe waiting-rooms, and to keep the depot and platform well lighted at night; but, to the public at large, the company owes "nothing beyond the observance of the duties of good neighborhood," which includes "the universal duty of doing no willful or wanton injury, and of not erecting or continuing, on

ACTION—*Continued.*

or near its platform or approaches, to which the public may be expected to go, any nuisance, trap, or pitfall, from which personal injury is likely to ensue." *Ib.* 448.

13. *Liability of owners and lessees of railroad.*—The building in the city of Montgomery known as the "Union Depot," with the yard or grounds annexed, is the property of the two railroad companies known as the South and North Alabama, and the Louisville and Nashville; but the Montgomery and Eufaula railroad company, having acquired by lease, at a stipulated rent, the right to use the property in common with them, for the arrival and departure of its trains, with the use of its waiting rooms, ticket-offices, baggage-room, &c., is liable to passengers and the public generally, in relation to the property, as if it were the owner in fee. *Ib.* 448.
14. *Application of these principles to case at bar.*—The plaintiff in this case came to Montgomery on the Montgomery and Eufaula railroad, and, on alighting from the train at the Union Depot, desiring to find a privy, made inquiry of a stranger, who pointed in the direction of a privy erected on the bank of the river, at the further end of the platform, about fifty yards from the depot; and in trying to find it, he wandered beyond it in the dark, fell down the steep bluff, and sustained serious injuries. The railroad platform was well lighted, and extended from the depot to the river; but there was no light at the privy, and a house intervened between it and the lights on the platform. *Held*, on these facts, that the plaintiff had no cause of action against the railroad companies who owned the property, as to them being a mere stranger; and that he could not recover against the Montgomery and Eufaula corporation, lessees of the property, because, being acquainted with the locality, he was guilty of contributory negligence in attempting to find the privy without further inquiry. *Ib.* 448.
15. *Action against railroad company; by female passenger, on account of misconduct of strangers at station.*—Although it is the duty of a railroad company, as a common carrier, to protect its passengers, and especially female passengers, against violence or disorderly conduct on the part of its own agents and servants, other passengers, and strangers, when such violence or misconduct may be reasonably anticipated and prevented; yet it is not liable to an action for damages at the suit of a female passenger, on account of obscene and profane language, indecent exposure of the person, and other disorderly conduct by two or three intruders, who came into the waiting-room at the station while plaintiff was awaiting the arrival of her train, when it is not shown that the company had notice of any facts which justified the expectation of such an outrage. *Batton v. South & North Ala. Railroad & Co.*, 591.
16. *Same; for personal injuries.* *Clements v. E. T., Va. & Ga. Railroad Co.*, 553.
17. *Same; for injuries to stock.* *E. T., Va. & Ga. Railroad Co. v. Bayless*, 429.
18. *Actions against joint trespassers; discontinuance.*—A plaintiff may, at his election, maintain a separate action against each of several joint trespassers, or a joint action against all, though he can have but one satisfaction; and if he elects to bring a joint action, he may "sue out an *alias* summons, or discontinue as to those on whom the summons is not served, and proceed to judgment against those on whom it has been executed" [Code, § 2911]; but the statute does not authorize him to sue out an *alias* summons as to one not served, take a final judgment by default against another, and continue as to a third who appears and pleads; and by such judgment the entire cause is discontinued. *Slade v. Street*, 576.

ADVANCES TO MAKE CROP.

1. *Whether conveyance is mortgage or crop-lien for advances.*—An instrument conveying the crops to be grown during the year, in form declaring a statutory lien for advances made and to be made (Code, §§ 3286-7), is effective only as a mortgage, on proof that it was given to secure an antecedent debt, and that no advances were in fact made on the faith of it. *Hamilton v. Maas & Brother*, 283.
2. *Conflicting liens for rent, advances, and under mortgage of crops.* The landlord's lien for rent (Code, § 3467) is superior to that of a mortgagee of the crops, though the mortgage was given before the beginning of the year; and if the landlord makes advances to enable his tenant to raise a crop, not only on the rented lands, but also on other lands owned by the tenant himself, taking a crop-lien note and mortgage (Code, §§ 3286-7), the lien of this instrument is superior to that of the prior mortgage, if the latter was given only for an antecedent debt; but the lien of the mortgage must prevail at law, against a note given for the unpaid purchase-money of land, though called rent, and payable in cotton, and assigned to the landlord of the maker. *Ib.* 283.
3. *Landlord's lien for advances.*—The landlord's lien for advances is placed by the statute on the same basis of equality as his lien for rent (Code, § 3469; Sess. Acts 1878-9, p. 72); any balance remaining due at the end of the year, the tenancy continuing for another year, is regarded as advances made on the crop of that year, and is protected by the lien of that year; and it is not necessary that the same lands shall be cultivated each year. *Thompson v. Powell*, 391.

ADVERSE POSSESSION.

1. *As against United States, or claimant under patent.*—Where the plaintiff claims title under a patent issued to him within three years before the commencement of the action, and there is no evidence of any prior claim or act of ownership by any person claiming under the United States, the defendant can not defeat a recovery by setting up his adverse possession, or his purchase at tax-sale, prior to the date of plaintiff's patent. *Bonner v. Phillips*, 427.

AGENCY.

1. *Liability of tax-collector, for acts of agent or deputy.*—An indictment against a tax-collector for embezzlement, to be sufficient as a charge of felony, must allege that the money was "at the time" in his hands; since, if collected by a deputy, though the principal might be liable civilly, he would not be liable criminally, unless the money came to his actual possession. *Britton v. The State*, 202.
2. *Subscription for stock in railroad company, procured by fraud of agent.*—A subscription to the stock of an incorporated railroad company, procured by the fraud of the company's agent soliciting subscriptions, may be defeated on the plea of fraud, when the company attempts to enforce it by suit. *Montgomery Southern Railway Co. v. Matthews*, 357.
3. *False representations by agent, as to location and completion of road.* Representations by the agent of a railroad corporation, soliciting subscriptions for stock from persons living along the contemplated route of the road, as to its intended location, and the time within which it will be completed to a particular place, are but the mere expression of an opinion, and neither constitute a fraud, nor are available as a defense to an action on a subscription for stock made on the faith of them, unless known by the agent to be false, and made by him with intent to deceive. *Ib.* 357.

AGENCY—*Continued.*

4. *Admissions or declarations of agent; when admissible as evidence against principal.*—The admissions and declarations of an agent are not binding on his principal, nor competent evidence against his principal, unless made within the scope of his authority, and while in the discharge of his duties in and about the particular transaction of which they constitute a part of the *res gesta*; and this principle applies equally to the agent of a corporation and of a natural person. *Danner Land & Lumber Co. v. Stonewall Insurance Co.*, 184.

ALTERATION OF WRITINGS.

1. *Alteration of note; special plea averring.*—In an action on a promissory note, a special plea of *non est factum* being interposed, averring a material alteration in the date, proof of the signature is not necessary to the admission of the instrument as evidence; if there is a suspicious alteration on its face, the *onus* is on the plaintiff to explain it; but, if not, the *onus* is on the defendant to show that it has been altered. *Barclift v. Treece*, 528.

AMENDMENTS.

1. *Amendment of complaint, on appeal from justice's court.*—When a cause is removed from a justice's court into the Circuit Court, either by appeal or by *certiorari*, it is triable *de novo*, without regard to any defect in the proceedings (Code, § 3121); and a trial may be there had on the original complaint, which may be amended, or a new complaint may be filed. *Littleton v. Clayton*, 571.
2. *Same.*—If the original complaint, as filed in the justice's court, was for forcible entry and detainer, a complaint for unlawful detainer may be filed in the Circuit Court. *Ib.* 571.
3. *Amendment by striking out parties.*—A statutory action in the nature of ejectment must be brought in the name of the person who holds the legal title; and if he is described in the summons and complaint as suing for the use of another person, these words may be struck out, by amendment (Code, § 3156), as surplusage. *Caldwell v. Smith*, 157.
4. *Sentence to hard labor for costs; amendment of clerical misprision.* A sentence to hard labor for the non-payment of costs amounting to \$53.95, at forty cents per day, should be for only one hundred and thirty-four days, the fraction over being excluded; but a judgment in excess of this number of days, being a clerical misprision, will be corrected without a reversal. *Morrisette v. The State*, 71.
5. *Same.*—A sentence to hard labor for non-payment of costs, in a criminal prosecution for a misdemeanor, can not exceed eight months, nor fifteen months in a case of felony (Sess. Acts 1880-81, p. 67); but a sentence beyond this limit, being a clerical error, will be corrected by this court, if the record contains no other error. *Miller v. The State*, 41.
6. As to amendments in chancery, see CHANCERY, 52, 71.

ARREST. See CRIMINAL LAW, 1.

ASSAULT. See CRIMINAL LAW, 5-6.

ASSIGNMENT.

1. *Assignment of policy of insurance; when assignee may sue in his own name.*—When a policy of insurance is assigned pursuant to its terms, the assignee may maintain an action on it in his own name, in the event of a loss (Code, § 2890); but, where a policy is taken out by the mortgagor in his own name, the addition of the words,

ASSIGNMENT—*Continued.*

- "Loss, if any, payable to J. F., to the extent of his mortgage interest," is a mere appointment of a part of the money, and does not constitute an assignment; nor does it authorize said J. F. to maintain an action on the policy in his own name, though the partial loss does not exceed the amount due on his mortgage. *Insurance Companies v. Felrath*, 194.
2. *Check on bank or debtor, not assignment of funds in hands of drawee.* A check, drawn and delivered to the person to whose order it is payable, does not, without acceptance by the drawee, operate as an assignment of the sum in his hands for which it is given; it may be revoked by the drawer, at any time before acceptance, and is revoked by his death; and there being no privity, express or implied, between the payee and the drawee, the former can maintain no action on it against the latter. *Nat. Com. Bank v. Miller*, 168.
 3. *Bill of exchange, not assignment of funds in hands of drawee.*—When a bank draws a bill of exchange in favor of a depositor, on a person who has funds in hand to meet it, this does not, without more, amount to an assignment or appropriation of any particular funds, so as to vest the property therein in the payee as against a subsequent assignee of the bank for the benefit of its creditors. *Ex parte Jones*, 330.

ATTACHMENT, AND GARNISHMENT.

1. *Sufficiency of affidavit.*—An affidavit for an attachment, sued out by a landlord against his tenant, for advances to make a crop (Code, §§ 3467, 3469, 3472-3), is to be liberally construed, and is sufficient if it sets forth with substantial accuracy the general jurisdictional facts, either expressly, or by necessary implication; nor is it necessary to negative conclusions or inferences to the contrary. *Gunter v. Dubose*, 326.
2. *Same.*—When an attachment is sued out on 30th December, claiming an indebtedness for advances made to enable the defendant to make a crop on lands rented from the plaintiff, but not stating for what year, the necessary and reasonable implication is, that the advances were made during the year just expiring; and if in fact any part was made during the preceding year, a balance remaining unpaid at the end of the year, such balance become a part of the advances for the next year, while the tenancy continues, and may be recovered under such affidavit; but it is the better practice to state the particular facts as they are. *Ib.* 326.
3. *Garnishment; what demands may be reached by.*—A debt or demand, for which the owner can not maintain an action of debt or *indebitatus assumpsit* in his own name, can not be reached and condemned by garnishment at the suit of his creditors. *Nat. Com. Bank v. Miller*, 168.
4. *Same.*—Where the defendant has a right of election, on account of a tort committed, either to sue for the tort, or, waiving the tort, to sue for money had and received, the relation of debtor and creditor does not exist, until he elects to sue for the money; and his creditors can not defeat his election, by garnishment against the wrong-doer. But this principle does not apply, where the garnishees, having received a check from the defendant, with authority to collect for deposit and use, have had the check certified by the bank on which it was drawn, before the service of the garnishment; being authorized to have it certified, and the relation of the parties being thereby changed, they are liable to the defendant for the amount of the check, as for money had and received, and that liability may be reached by garnishment. *Ib.* 168.
5. *Same.*—When a person has in his hands money belonging to an-

ATTACHMENT, AND GARNISHMENT—*Continued.*

other, or owes him a debt previously contracted, a request by the creditor that he will pay the money, or any part of it, to a third person to whom he is indebted, or a written order to that effect, without any present valuable consideration, does not change the ownership of the debt or money, and will not support an action by such third person to recover it; but, where the purchaser of goods agrees, at the time of the sale, to pay the purchase-money by satisfying debts due from the vendor to third persons, the promise enures to the benefit of those third persons, is supported by a valuable consideration which takes the case out of the statute of frauds, and may be enforced by them by action in their own name; and a creditor of the vendor can not, by garnishment sued out before their acceptance of the promise, intercept the money as belonging to their debtor. *Coleman & Carroll v. Hatcher & Brannon*, 217.

6. *Summons of transferee, or adverse claimant.*—When the answer of a garnishee admits an indebtedness or liability which is subject to garnishment, but discloses the fact that the demand is claimed by a third person, the statute requires that the adverse claimant shall be notified to appear (Code, § 3302); and it is error to discharge the garnishee, although his answer is not contested. *Nat. Com. Bank v. Miller*, 168.
7. *Judgment against garnishee, and against claimant of fund.*—When a garnishment is sued out in aid of a pending action (Code, § 3319), and a claimant of the fund in the hands of the garnishee, being summoned, propounds his right and interest; the issue being tried before judgment has been rendered in the original suit, a judgment for costs may be rendered against the claimant, and his claim be declared invalid; but it is irregular to render judgment final against the garnishee, in favor of the plaintiff, with an award of execution. *Seals v. Holloway's Adm'r*, 344.
8. *Insolvency of defendant's estate, before judgment against garnishee.* On the death of a defendant pending the suit, the action being revived against his administrator, who afterwards reports the estate insolvent, and suggests to the court that it has been reported and declared insolvent, no valid judgment can afterwards be rendered against the garnishee. *Ib.* 344.
9. *Claim of exemption against garnishment; where filed.*—When a garnishment is levied upon any personal property other than money or choses in action, a claim of exemption thereto "must be lodged with the officer making the levy" (Code, § 2834); but, when the levy is upon "any money or choses in action" (*Ib.* § 2842), the claim of exemption must be filed, verified by affidavit, in the court where the proceeding is pending; and it may be interposed at any time before the debt is condemned in the hands of the garnishee, but subject to reasonable regulation by the court. *Todd v. McCravy*, 468.

ATTORNEY AT LAW.

1. *Argument of counsel.*—Under the rule established by the former decisions of this court, counsel transgress the bounds of legitimate argument, in addressing remarks to the jury about matters which are not in evidence before them; and the presiding judge has ample power to check argument of this character. *Railroad Co. v. Carlos*, 443.

BAIL. See CRIMINAL LAW, 4.

BANKRUPTCY.

1. *Rights of assignee in bankruptcy.*—An assignee in bankruptcy, under the law of 1867, took the property of the bankrupt subject to all the legal and equitable claims of third persons, except in case of a fraudulent conveyance by the bankrupt. *Cain v. Sheets*, 492.
2. *Sale of lands by assignee, under order of court; rights of persons not parties.*—A sale of land by an assignee in bankruptcy, under an order of court, can not affect the rights of third persons, who are not made parties, and who have no notice, although their rights would have been concluded if they had been brought in. *Ib.* 492.
3. *Same; heirs and administrator as parties.*—Where the bankrupt surrendered a tract of land which he had bought, not having paid the purchase-money, and having only received a bond for title; a sale of the land by the assignee, under an order of the court, does not affect the title of the heirs of the deceased vendor, who were not made parties, although the administrator was brought in. *Ib.* 492.

BANKS.

1. *Check on bank or debtor; not assignment of funds in hands of drawee.* A check, drawn and delivered to the person to whose order it is payable, does not, without acceptance by the drawee, operate as an assignment of the sum in his hands for which it is given; it may be revoked by the drawer, at any time before acceptance, and is revoked by his death; and there being no privity, express or implied, between the payee and the drawee, the former can maintain no action on it against the latter. *Nat. Com. Bank v. Miller & Co.*, 168; also, *Ex parte Jones*, 330.
2. *Indorsement of check "for collection," or "for deposit."*—When a bank receives from a customer a check on another bank, for the special purpose of collection, the title does not pass by the special indorsement for that purpose; nor does the receiving bank owe the amount, until the check is collected. But, where the customer has a deposit account with the bankers, on which he is accustomed to deposit checks payable to himself, which are entered on his pass-book, and to draw against such deposits; an indorsement of the words "*For deposit*," on a check so deposited, "is, in the absence of a different understanding, presumptive of more than a mere agency or authority to collect"—it is a request and direction to deposit the sum to the credit of the customer, and gives to the bankers authority, not only to collect, but to use the check in such manner as, in their judgment and discretion, having reference to the condition and necessities of their business, may make it most available to their protection: and they may have it certified by the bank on which it is drawn. *Nat. Com. Bank v. Miller & Co.*, 168.
3. *Certifying bank check.*—A certified check has a distinctive character as a species of commercial paper, the certification constituting a new contract between the holder and the certifying bank; the funds of the drawer are, in legal contemplation, withdrawn from his credit, and appropriated to the payment of the check, and the bank becomes the debtor of the holder as for money had and received. *Ib.* 168.
4. *Same; what demands may be reached by garnishment.*—Where the defendant has a right of election, on account of a tort committed, either to sue for the tort, or, waiving the tort, to sue for money had and received, the relation of debtor and creditor does not exist, until he elects to sue for the money; and his creditors can not defeat his election, by garnishment against the wrong-doer. But this principle does not apply, where the garnishees, having received a check from the defendant, with authority to collect for deposit and

BANKS—*Continued.*

use, have had the check certified by the bank on which it is drawn, before the service of the garnishment: being authorized to have it certified, and the relation of the parties being thereby changed, they are liable to the defendant for the amount of the check, as for money had and received, and that liability may be reached by garnishment. *Ib.* 168.

5. *Fraud of insolvent bank, drawing bill in favor of depositor; right of payee to rescind.*—When an insolvent bank draws a bill of exchange, in favor of a depositor, on a business correspondent with whom it has funds on deposit, and the bill is dishonored on presentation, because of an intervening assignment for the benefit of creditors made by the insolvent bank, the payee can not claim to rescind the contract, and be remitted to his original *status* as a depositor, when it is not shown that any intentional fraud or deception was practiced on him, nor that the bank had no reasonable expectation that the bill would be honored on presentment. *Ex parte Jones*, 330.
6. *Voluntary assignment by bank, drawer of bill; right of payee to rescind.*—When a party disables himself, by his own voluntary act, to comply with his contract, the other party may treat it as rescinded, and claim to be placed *in statu quo*, when the contract relates to property, which remains *in specie*, unaltered and undisposed of; but this principle can not be invoked by a depositor in an insolvent bank, because a bill of exchange, drawn in his favor by the bank, is dishonored in consequence of a subsequent assignment by the bank for the benefit of its creditors; no intentional fraud being shown, and no want of funds by the drawee, when the bill was drawn. *Ib.* 330.
7. *Payment of bill as between drawer and discounting bank.*—When a bank has discounted a bill of exchange for the drawer, and still retains the ownership and control of it, an acceptance of a conveyance of property from the drawer, in absolute discharge of his liability, extinguishes the bill as a legal liability. *Williams, Deacon & Co. v. Jones*, 294.
8. *Indorsement for collection.*—An indorsement of a bill or note for collection only—as by the words, “Pay to W. D. & Co., for account of Bank of Mobile,” accompanied with a letter of advice that the bill was remitted for the credit of the remitting bank—does not change the ownership of the bill or note, but it remains the property of the remitting bank. *Ib.* 294.
9. *Advancing money on faith of bill so held.*—If the bank to whom a bill or note is thus remitted for collection, having the possession, on the faith and credit thereof advances money to the remitting bank, or accepts its drafts in anticipation of the collection, either by express agreement, or in accordance with the usual course of dealing between them; as to whether it thereby acquires a lien on the bill or note, or an interest therein which will support its custody as rightful against the remitting bank, until the advance or acceptance is repaid, see authorities cited. *Ib.* 294.
10. *Wrongful payment, and ratification thereof.*—If the drawer of the bill, having notice of the fact that the discounting bank has transferred it for collection to its business correspondent, and that the latter has acquired a lien by advancing money on the faith of it before maturity, pays the bill to the discounting bank, the payment is wrongfully made, and wrongfully accepted, and does not discharge the drawer from liability to the bank or person having the lien, unless ratified; and if the payment was made in property, which remains in specie, the discounting bank holds such property in trust for its correspondent, if the latter elects to ratify the payment. *Ib.* 294.

BIGAMY. See CRIMINAL LAW, 7-10.

BILL OF EXCEPTIONS.

1. *When necessary or proper.*—A bill of exceptions is not a part of the record proper, but is only made a part of the record by statute for the purpose of enabling the appellate court to revise rulings which are not shown by the record itself; and its recitals as to matters which are a part of the record proper, but as to which the record itself is silent, can not be considered for any purpose. *Diggs v. The State*, 68.
2. *Same.*—A motion in arrest of judgment must be founded on defects or errors apparent on the face of the record; and when shown only by bill of exceptions, it can not be considered by this court. *Ib.* 68.
3. *Same.*—A ruling on demurrer is part of the record proper, and is not matter for a bill of exceptions; and when shown only by the bill of exceptions, this court will not consider it for any purpose. *Baker v. Keith*, 544.
4. *Same.*—To enable this court to revise the refusal of an application for a change of venue in a criminal case (Sess. Acts 1884-5, p. 140). the point must be duly reserved by bill of exceptions, and a recital of an exception in the judgment-entry only is not sufficient. *Jones v. The State*, 98.
5. *Conflict between judgment-entry and bill of exceptions.*—As to matters of which the bill of exceptions should properly speak—*e. g.*, the rulings of the court on a motion to exclude evidence—its recitals must control the contradictory recitals of the judgment-entry. *McDonald v. Jacobs*, 524.
6. *Contents, and exhibits.*—Where the bill of exceptions directs the clerk to incorporate a document read in evidence, but the document itself is not set out, nor so described as to be properly identified, this court will not consider for any purpose a document copied in another part of the transcript, although the clerk states, in a memorandum preceding it, "The following pieces of evidence were mislaid at the time the above part of the transcript was made out, but have since been found, and are here copied as a part of this record." *Moore v. Helms*, 379.
7. *Exception to ruling or action invoked by party excepting.*—No exception can be based upon any ruling or action of the court below which was induced by the request or objection of the party excepting. *DeArman v. The State*, 10.
8. *General exception to charges given or refused.*—A general exception to several charges given can not be sustained, unless each one of them is erroneous; nor can a general exception to the refusal of several charges asked be sustained, unless each one of them asserts a correct legal proposition, which is applicable to the evidence. *Bedwell v. Bedwell*, 587.
9. *Exception to exclusion of evidence; presumption in favor of judgment.* When objection is made to the answer of a witness to an interrogatory, but not to the interrogatory itself, and the answer is not set out in the record, this court will presume that the answer was legal evidence. *Ib.* 587.

BILLS OF EXCHANGE, AND PROMISSORY NOTES.

1. *Bill of exchange, not assignment of funds in hands of drawee.* When a bank draws a bill of exchange in favor of a depositor, on a person who has funds in hands to meet it, this does not, without more, amount to an assignment or appropriation of any particular funds, so as to vest the property therein in the payee as against a subsequent assignee of the bank for the benefit of its creditors. *Ex parte Jones*, 330.

BILLS OF EXCHANGE, AND PROMISSORY NOTES—*Continued.*

2. *Check on bank or debtor; not assignment of funds in hands of drawee.*
A check, drawn and delivered to the person to whose order it is payable, does not, without acceptance by the drawee, operate as an assignment of the sum in his hands for which it is given; it may be revoked by the drawer, at any time before acceptance, and is revoked by his death; and there being no privity, express or implied, between the payee and the drawee, the former can maintain no action on it against the latter. *Nat. Com. Bank v. Miller & Co., 168.*
3. *Indorsement of check "for collection", or "for deposit."*—When a bank receives from a customer a check on another bank, for the special purpose of collection, the title does not pass by the special indorsement for that purpose; nor does the receiving bank owe the amount, until the check is collected. But, where the customer has a deposit account with the bankers, on which he is accustomed to deposit checks payable to himself, which are entered on his pass-book, and to draw against such deposits; an indorsement of the words "*For deposit,*" on a check so deposited, "is, in the absence of a different understanding, presumptive of more than a mere agency or authority to collect"—it is a request and direction to deposit the sum to the credit of the customer, and gives to the bankers the authority, not only to collect, but to use the check in such manner as, in their judgment and discretion, having reference to the condition and necessities of their business, may make it most available to their protection; and they may have it certified by the bank on which it is drawn. *Ib. 168.*
4. *Indorsement for collection.*—An indorsement of a bill or note for collection only—as by the words, "*Pay to W. D. & Co., for account of Bank of Mobile,*" accompanied with a letter of advice that the bill was remitted for the credit of the remitting bank—does not change the ownership of the bill or note, but it remains the property of the remitting bank. *Williams, Deacon & Co. v. Jones, 294.*
5. *Advancing money on faith of bill so held.*—If the bank to whom a bill or note is thus remitted for collection, having the possession, on the faith and credit thereof advances money to the remitting bank, or accepts its drafts in anticipation of the collection, either by express agreement, or in accordance with the usual course of dealing between them; as to whether it thereby acquires a lien on the bill or note, or an interest therein which will support its custody as rightful against the remitting bank, until the advance or acceptance is repaid, see authorities cited. *Ib. 294.*
6. *Wrongful payment, and ratification thereof.*—If the drawer of the bill, having notice of the fact that the discounting bank has transferred it for collection to its business correspondent, and that the latter has acquired a lien by advancing money on the faith of it before maturity, pays the bill to the discounting bank, the payment is wrongfully made, and wrongfully accepted, and does not discharge the drawer from liability to the bank or person having the lien, unless ratified; and if the payment was made in property, which remains in specie, the discounting bank holds such property in trust for its correspondent, if the latter elects to ratify the payment. *Ib. 294.*
7. *Payment of bill as between drawer and discounting bank.*—When a bank has discounted a bill of exchange for the drawer, and still retains the ownership and control of it, an acceptance of a conveyance of property from the drawer, in absolute discharge of his liability, extinguishes the bill as a legal liability. *Ib. 294.*
8. *Fraud of insolvent bank, drawing bill in favor of depositor; right of payee to rescind.*—When an insolvent bank draws a bill of exchange, in favor of a depositor, on a business correspondent with

BILLS OF EXCHANGE, AND PROMISSORY NOTES—*Continued.*

- whom it has funds on deposit, and the bill is dishonored on presentation, because of an intervening assignment for the benefit of creditors made by the insolvent bank, the payee can not claim to rescind the contract, and be remitted to his original *status* as a depositor, when it is not shown that any intentional fraud or deception was practiced on him, nor that the bank had no reasonable expectation that the bill would be honored on presentment. *Ex parte Jones*, 330.
9. *Voluntary assignment by bank, drawer of bill; right of payee to rescind.*—When a party disables himself, by his own voluntary act, to comply with his contract, the other party may treat it as rescinded, and claim to be placed *in statu quo*, when the contract relates to property, which remains *in specie*, unaltered and undisposed of; but this principle can not be invoked by a depositor in an insolvent bank, because a bill of exchange, drawn in his favor by the bank, is dishonored in consequence of a subsequent assignment by the bank for the benefit of its creditors; no intentional fraud being shown, and no want of funds by the drawee, when the bill was drawn. *Ib.* 330.
 10. *Certifying bank check.*—A certified check has a distinctive character as a species of commercial paper, the certification constituting a new contract between the holder and the certifying bank; the funds of the drawer are, in legal contemplation, withdrawn from his credit, and appropriated to the payment of the check, and the bank becomes the debtor of the holder as for money had and received. *Nat. Com. Bank v. Miller & Co.*, 168.
 11. *Promissory note of administrator, for debt of estate; when binding on him personally.*—When an administrator executes a promissory note, under authority granted by an order of the Probate Court (Code, § 2432), for the purpose of settling or extending a debt of the estate, the note imposes no personal liability upon him; but, if the proceedings are substantially defective, and, by reason thereof, the note is not binding on the estate, the general rule applies which governs the contracts of trustees and agents, and the notes imposes a personal liability on the administrator. *McCalley v. Wilburn & Co.*, 549.
 12. *When wife may sue on note, payable to husband.*—A promissory note, given for the purchase-money of lands belonging to the statutory estate of the wife, though taken payable to the husband, is a part of the *corpus* of her estate; and she may maintain an action on it in her own name, without any assignment or transfer by the husband. *Grantham v. Payne*, 584.
 13. *Proof of ownership of note.*—In an action by the wife, on a promissory note payable to the husband, and not assigned by him, he may testify that the note belongs to the plaintiff, and not to himself. *Ib.* 584.

BONDS.

1. *Official bond of county officers; non-residence of sureties.*—Although the statute declares that the official bonds of tax-collectors (and other officers therein specified) “shall be invalid and insufficient in law, unless the sureties upon such bonds respectively reside in the county in which the duties of such officers are to be performed” (Code, § 164); yet the bond is not void because of the non-residence of one or more of the sureties, nor can the sureties set up the fact of such non-residence in defense of an action on the bond. *The State v. Flinn*, 100.
2. *Official bond of probate judge; when action lies on.*—In granting or refusing a license to retail spirituous liquors, a probate judge acts

BONDS—*Continued.*

ministerially, not judicially; and an action lies on his official bond, if he improperly refuses to issue a license to an applicant who has fully complied with all the statutory requisitions. *Grider v. Tally*, 422.

3. *Injunction bond; summary execution on.*—When an injunction is sued out by the heirs of the decedent, to enjoin proceedings under an execution issued on a judgment against the administrator, which has been levied on their lands; the injunction bond being payable and conditioned as required by the statute, and duly certified by the register on the dissolution of the injunction (Code, §§ 3870-76); execution may be thereon issued against the obligors, for the amount of the judgment, with interest and damages; and they can not supersede it because the judgment is held void as against the decedent's estate. *McCalley v. Wilburn & Co.*, 549.

BURGLARY. See CRIMINAL LAW, 11, 12.

CERTIORARI.

1. *To justice's judgment; limitation of.*—It is no objection to a *certiorari*, when sued out to review a judgment rendered by a justice of the peace, that it was sued out after the expiration of the five days allowed for taking an appeal (Code, § 3654); the limitation of the writ, in such case, "would probably be one year." *Grantham v. Payne*, 587.
2. *Same; trial de novo, and amendment of complaint.*—When a cause is removed from a justice's court into the Circuit Court, either by appeal or by *certiorari*, it is triable *de novo*, without regard to any defect in the proceedings (Code, § 3121); and a trial may be there had on the original complaint, which may be amended, or a new complaint may be filed. *Littleton v. Clayton*, 571.

CHANCERY.

JURISDICTION, AND GENERAL PRINCIPLES.

1. *Approval of voluntary act, which would have been compelled*; application of principle to conveyances between husband and wife. *Lee v. Lee*, 412; *Harden v. Darwin & Pulley*, 473.
2. *Cancellation of deed as cloud on title.*—A court of equity will not entertain jurisdiction of a bill for the cancellation of a deed as a cloud on the complainant's legal title, when he is out of possession, unless special grounds for equitable interposition are shown, but will leave the complainant to the assertion of his legal title in a court of law. *Peebles v. Burns*, 290.
3. *Same.*—When the complainant acquired his possession by force and arms, or other unlawful means, a court of equity will not interfere to protect it by cancelling a deed as a cloud on his title. *Tomlinson v. Watkins*, 399.
4. *Cancellation of conveyance by husband and wife; ignorance of contents.*—A conveyance of the wife's property, duly executed by her and her husband, will not be cancelled and set aside, at her instance, on averment "that she was induced and persuaded by her said husband to sign said deed, without knowing the purport and effect thereof." *Ib.* 399.
5. *Covenant running with land; enforcement in equity.*—A court of equity will enforce by injunction, against a sub-purchaser with notice, a covenant running with the lands, and restricting the use thereof; and this jurisdiction is not dependent on the insolvency of the defendant. *Webb v. Robbins*, 176.
6. *Creditor's bill for discovery.*—A judgment creditor, having an unsat-

CHANCERY—*Continued.*

- isfied execution, may file a bill in equity for discovery and relief under the statute (Code, § 3882), without alleging fraud on the part of his debtor, or the concealment of his property with intent to hinder, delay, or defraud his creditors; and he may frame its allegations in the alternative.—*Floyd v. Floyd*, 353.
7. *Same*.—If the bill alleges that, at the time of the rendition of the complainant's judgment, the defendant owned and held lands particularly described; that he and his wife have conspired to defraud complainant; that the wife now pretends to own and hold the lands, with all the other property belonging to her husband; and that if he ever executed to her any deed or other writing, it was executed after the complainant's right had accrued, was without valid consideration, and executed with intent to defraud complainant; these allegations are not equivalent to an averment of a fraudulent conveyance by the debtor to his wife. *Ib.* 353.
 8. *Decedent's estate; bill for settlement*.—When a bill seeks to compel a final settlement of a decedent's estate, it must aver or show that the estate is ready for a final settlement. *Acklen v. Goodman*, 521.
 9. *Decree construed, as affected by consent and agreement of record*.—A decree in a chancery cause, rendered under a submission on pleadings and proof, held the complainant, a married woman, entitled to relief; vested the lands in controversy in her, "as her separate estate under the laws of this State;" perpetually enjoined the defendants, purchasers at execution sale against her husband, from the further prosecution of their action at law, and then added: "And the defendants having agreed to assent to this decree, and to release all errors, as shown by their agreement hereunder written, it is by consent further ordered and decreed, that the complainant's next friend pay the costs of this suit," &c. The agreement was signed by the solicitors of both parties, and was in these words: "We hereby assent to the foregoing decree, and hereby release all errors." *Held*, that the agreement only extended to a release of errors on one side and the assumption of costs on the other, and did not show that the decree was rendered by consent, so far as it affected the character of the complainant's estate in the lands. *Lee v. Lee*, 412.
 10. *Decree declaring lands to belong to married woman "as her separate estate under the laws of this State;" whether estate is statutory or equitable*.—Under a decree in a chancery cause, rendered in 1875 (before the decision in *Short v. Battle*, 52 Ala. 456, re-established the distinction between the statutory and equitable estates of married women), enjoining actions at law by purchasers at execution sale against the husband, and vesting the title to the lands in controversy in the wife, who was the complainant, "as her separate estate under the laws of this State;" these words "are of doubtful import on their face," and the court does not decide whether they create a statutory or an equitable estate; but they do not establish an intended change in the character of the complainant's estate, as shown by the pleadings and proof. *Ib.* 412.
 11. *Decree for sale of lands, "subject to mortgages"*.—In a suit by judgment creditors of the husband, seeking to set aside as fraudulent a conveyance of lands to the wife, and to subject the land by sale to the satisfaction of their judgments; subsequent mortgagees of the husband and wife having intervened, asserting their rights, and claiming protection as purchasers for valuable consideration without notice; *held*, that a decree in favor of the complainants, ordering the lands to be sold "subject to the said mortgages," was a recognition and determination of the validity of the mortgages, and estopped the complainants from assailing their validity, in a

CHANCERY—*Continued.*

- subsequent suit seeking to redeem from the purchasers at the sale under the decree, who afterwards succeeded by purchase to the rights of the mortgagees. *Holden v. Rison & Co.*, 515.
12. *Equitable mortgage; writing held insufficient.*—A letter addressed to a merchant, in these words: "I am always the man to do right. If you think it proper to put the guano in the paper that Mr. H. has against me and my boys, it will be all right with me," is not so free from ambiguity as to authorize the court to construe it as a verbal mortgage for the price of the guano, operating *in presenti*. *Knorr v. Wilson*, 309.
 13. *Foreclosure of mortgage; money decree against mortgagor.*—On the foreclosure of a mortgage in equity, a personal decree may be rendered against the mortgagor in the first instance, for the amount due on the mortgage debt, as ascertained under a reference; although an execution can not be issued on such decree (Code, § 3908), until after the mortgaged property has been sold and the sale has been confirmed, and then only for the balance remaining due. *McCall v. Rogers*, 349.
 14. *Fraud as ground of equitable relief.*—Fraud is not, of itself, a ground for equitable interference, where the complainant has a legal title, and a full and adequate remedy at law; and the fact that her name was forged—was signed without her authority, knowledge, or consent—as grantor with her husband, to a conveyance of lands belonging to her statutory estate, of which the defendant is in possession, claiming under the forged deed, is no obstacle to a recovery at law, and, therefore, no special ground for equitable interference. (SOMERVILLE, J., dissenting.) *Preples v. Burns*, 290.
 15. *Guardian and ward; jurisdiction of equity to compel settlement.*—The Chancery Court has original jurisdiction over the settlement of guardian's accounts, and the ward may invoke its jurisdiction, at any time before proceedings have been commenced in the Probate Court, without assigning any special reasons. *Fulgham v. Herstein*, 496.
 16. *Injunction pending suit, as determined by relative inconvenience and damage to parties.*—In granting or refusing an injunction pending the suit, the court is invested with large discretionary powers, the exercise of which is materially controlled by consideration of the relative inconvenience and damage which may result to either party; and where, as here, though continuous breaches of contract are threatened, and consequent damage to the plaintiff, suing as surviving partner, there is no averment that the defendants are insolvent, and the injunction would probably cause greater damage to the executor of the deceased partner, by preventing his performance of the testator's contract, in aid of which the contract with the partnership was made, an injunction ought not to be granted. *Davis v. Sowell & Co.*, 262.
 17. *Injunction against enforcing subscription to railroad.*—Although an action on the defendant's subscription for stock can not be defeated on the ground of fraud, when the representations of the corporation's soliciting agent were merely the expression of an opinion as to the probable location and completion of the road; yet, if the agent further represented that the money subscribed would be refunded unless the road was so located and completed, and he was authorized to make these representations, the action will, it seems, be enjoined in equity, on proof of the insolvency of the corporation and its abandonment of the work before completion. *Montgomery Southern Railroad Co. v. Matthews*, 357.
 18. *Equitable relief against judgment at law; refusal of continuance on account of sickness.*—An application for a continuance is addressed to the discretion of the primary court, and its refusal is neither re-

CHANCERY—*Continued.*

visible on error or appeal, nor ground for equitable relief against the judgment; consequently, the defendant can not obtain equitable relief against the judgment, on the ground that he was prevented by sickness from attending and making defense at the trial term, when it appears that his attorney asked a continuance on that ground, and the court refused it. *Campbell v. White*, 397.

19. *Purchase of lands by husband, with wife's money; approval by court of voluntary act which it would have compelled.*—When lands are bought by the husband with moneys belonging to the separate estate of his wife, whether statutory or equitable, and the title taken in his own name, a court of equity will, at the instance of the wife, compel him to convey the property to her, by words creating the same estate as that by which she held the money, unless creditors or purchasers have acquired intervening rights; and if the husband does this voluntarily, the court will sanction and approve the act. *Lee v. Lee*, 412.
20. *Same.*—Although the wife can not repudiate an investment of her moneys by her husband, with her consent, in the purchase of lands for her, and recover the money invested; yet, where the husband purchases lands in his own name, and for his own benefit, using funds belonging to the separate estate of his wife, with her consent, in paying the purchase-money, the same principle applies as in case of any other purchase by a trustee with trust funds; she may charge the husband personally, or trace the money and claim the lands, or charge them with the re-payment of her money used in their purchase; and she may assert this equity against all persons except a purchaser for value without notice. *Sawyers v. Baker*, 461.
21. *Same; conflicting equities of wife, and sureties and mortgagees of vendor.*—When an administrator sells land under a probate decree, becoming himself the purchaser, giving his note with sureties for the purchase-money, and executing to them, after the maturity of the note, but before he had obtained a conveyance under the order of the court, a mortgage on the lands for their indemnity; if he re-sells a portion of the lands to the husband of one of the distributees, who, with his consent, and with the knowledge of his sureties on the note, uses the wife's distributive share in part payment to the succeeding administrator; the sureties, having afterwards paid the balance due on the note, can not assert, as against the equity of the wife arising out of such use of her moneys, a superior right by subrogation, nor under the mortgage. *Ib.* 461.
22. *Purchase of lands with joint moneys of husband and wife; resulting trust, and voluntary partition.*—When lands are purchased and paid for, partly with the moneys of the husband, and partly with money belonging to the statutory estate of the wife, the title being taken in her name, a resulting trust may be established in favor of the husband, to the extent of his moneys so invested, by proof repelling the presumption of an advancement or provision for the wife; and if the parties voluntarily execute a deed of partition, reciting the facts, a court of equity will sustain and enforce it against the wife or her heirs, "so far as the partition clearly appears to be fair and just;" but, if two separate tracts of land are so bought, at different times, and by distinct contracts, and by the deed of partition one tract is assigned to each, thereby effecting a partial exchange, a court of equity will not enforce it against the wife or her heirs, though it might be sustained "when shown to be equitable and for the benefit of the wife." *Harden v. Darwin & Pulley*, 473.
23. *Same; recitals of deed.*—The recitals of the deed of partition in such case, if made deliberately and freely, are entitled to great weight, but are not conclusive; and when it is shown, as here, that they

CHANCERY—*Continued.*

are untrue in fact, that the partition was not equitable, fair and just, and that it was procured by undue influence and other improper means while the wife was an invalid, a court of equity will cancel and set it aside, at the instance of her heirs, although it is not shown that the entire purchase-money was paid by the wife. *Ib.* 473.

24. *Same; when mortgagee is not entitled to protection as purchaser without notice.*—If, in such case, the lands assigned to the husband, by the deed of partition, are afterwards mortgaged by him and his wife, as security for his debt, the mortgagee can not claim protection as a *bona fide* purchaser without notice, on account of the deed of partition, but is charged with notice of all the facts shown by the records of the Probate Court, relative to the purchase by the wife at an administrator's sale, which is mentioned in the deed. *Ib.* 473.
25. *Partnership; remedies of surviving partner.*—The partnership having entered into a contract with the deceased partner while living, for the sale to him of a large quantity of lumber, in the manufacture of which the partnership was engaged, to be delivered during a period of several months, as required to fill his private contract with an exporting company; and, on the destruction of the mills of the partnership by fire, after the death of the deceased partner, the survivor having contracted with the owners of another mill for the manufacture and delivery of the lumber necessary to complete the contract; if such sub-contractors fail or refuse to deliver the lumber as stipulated, the survivor may maintain an action against them for the breach; if, ignoring his rights, they deliver the lumber to the executor of the deceased partner, the possession of the latter would be wrongful, and he would be liable personally to the surviving partner for any disposition he might make of the lumber; and if he applied it in part performance of his testator's contract with the exporting company, the surviving partner might maintain an action against the estate of the deceased, as for goods sold and delivered. Hence, having these remedies at law, the surviving partner can not maintain a bill in chancery on these facts, without averring other facts which show the necessity for equitable interference. *Davis v. Sowell & Co.*, 262.
26. *Partition; legal and equitable titles.*—A court of equity may decree a partition of lands, whether the title of the parties be legal or equitable; and while the practice generally is to refer the decision of a disputed legal title to the jury, the whole question is for the decision of the court when an equitable title is involved. *Berry v. Webb*, 507.
27. *Voluntary partition by parol.*—Whether a partition of lands by parol agreement, followed by possession taken and held, pursuant to its terms, for a period less than ten years, will bar a bill in equity for partition, is not decided. *Ib.* 507.
28. *Partition refused, on account of insufficient proof of title.*—Where the complainant asserted title under a conveyance of the land to him and his sister by their father, as an advancement, and asked a reformation of the deed by correcting an alleged mistake in the description of the land intended to be conveyed; and the evidence showed that, by subsequent agreement between him and his father, another tract was conveyed to him in lieu of his interest in the first, and that possession was taken and held, pursuant to this arrangement, until after the death of the father, when complainant had the first deed recorded, and then filed his bill asking a reformation and partition; *held*, that the bill was properly dismissed on the evidence. *Ib.* 507.
29. *Reformation of conveyance, and partition of lands; jurisdiction of*

CHANCERY—*Continued.*

- equity.*—A court of equity has undoubted jurisdiction to reform a conveyance of lands, by correcting a mistake in the description of the premises, when established by clear and satisfactory evidence; and to decree partition of lands between two tenants in common, although the defendant had been in possession, holding adversely, for any period less than ten years. *Ib.* 507.
30. *Redemption under mortgage; who may file bill.*—No person can come into a court of equity for a redemption of a mortgage, but one who is entitled to the legal estate of the mortgagor, or claims a subsisting interest under him; and where the husband, as trustee, joins with his wife in a mortgage of her lands, an assignee or purchaser from him can not maintain a bill to redeem. *Holden v. Rison & Co.*, 515.
 31. *Statutory right of redemption; not extended in equity.*—The right of redemption, given by statute to judgment creditors (Code, §§ 2881-82), can not be extended by a court of equity to creditors by simple contract only, although their debts are ascertained and adjudged by the decree. *Seals v. Pfeiffer & Co.*, 278.
 32. *Set-off in equity against mortgage debt.*—When the mortgagee files a bill to foreclose, the mortgagor may set up any defense, except the statute of limitations, which would be available at law in an action on the debt; and hence he may, in extinguishment or reduction of the mortgage debt, set off any other debt or demand which would be available at law; but, when the bill is filed by the mortgagor himself, seeking to enjoin a sale of the property under a power in the mortgage, he must show some other ground for equitable interference, before he can establish as a set-off an independent debt or demand, for which he has an adequate remedy at law. *Knight v. Drane*, 371.
 33. *Specific performance of agreement for sale of land.*—To authorize the specific performance of an agreement for the sale of land, which rests largely in judicial discretion, and depends upon an equitable consideration of the particular circumstances of each case, the contract must be founded on a valuable consideration, and must be just, fair and reasonable; must not have originated in mistake, surprise, violation of confidence, breach of trust, or advantage of condition, nor been obtained by unconscientious or unfair methods; must be reasonably certain in respect to the subject-matter, the terms and stipulations, and its performance must not work hardship or injustice. *Carlisle v. Carlisle*, 339.
 34. *Same; allegation and proof of terms.*—The terms of the contract must be definitely alleged, and must be established as alleged by clear and satisfactory proof; and if any of the terms are left in doubt and uncertainty, or there is a variance between the allegations and the proof as to any of the terms, a specific performance will not be decreed. *Ib.* 339.
 35. *Same; entire and partial performance.*—Partial performance of an entire contract will not be decreed; hence, where there are several joint vendors, a specific performance will not be decreed against one only, the others not being parties to the bill, and the stipulations of the contract between them and the complainant never having been performed. *Ib.* 339.
 36. *Same; tender, or offer to perform.*—When the stipulations of the contract are mutual and dependent, simultaneous performance by both parties being contemplated and intended, a tender, or offer to perform by the complainant, must generally precede the commencement of the suit; and in all cases, whether such precedent tender be necessary or not, he must aver in his bill an offer, readiness and willingness to perform, submitting himself to the orders and directions of the court. *Ib.* 339.

CHANCERY—Continued.

37. *Same; hardship or injustice to third person.*—Where the contract sought to be enforced was between the children and devisees of a decedent, for the purchase of the family homestead by the complainant, and the widow was induced by him and the defendant, who were trustees for her under the will, not to dissent from the will, but to assent to the sale, and to accept the provision thereby made for her, the complainant promising that she should continue to live at the homestead with him, and be treated with kindness and affection; while this promise may not have been intended as a stipulation of the contract, it is an equitable consideration which the court will not disregard; and its performance having become impracticable, by reason of the estrangement which has since arisen between the complainant and the widow, growing out of the contract, a specific performance will not be decreed, since it might work hardship or injustice to her. *Ib.* 339.
38. *Subrogation of creditor to rights of surety.*—All pledges or securities, given by the principal debtor to his surety, for his indemnity, are regarded as a trust fund for the payment of the debt; and the creditor is entitled to be subrogated to all the rights thereby conferred on the surety, whether the latter has been damnified or not; but he has no greater rights than are conferred on the surety, and can not enforce a mortgage, or other instrument, given merely to save the surety harmless against a contingent liability or loss which has not happened,—at least, without the intervening insolvency of both the principal and the surety. *Daniel v. Hunt*, 567.
39. *Same; mortgage construed as intended for indemnity of surety, and enuring to benefit of creditor.*—A mortgage, executed by a guardian to the surety on his official bond, conditioned that he "shall manage said guardianship in the terms of the law," and, if he "fails to comply with the terms of the law in the said guardianship, and cause loss by the said" surety, authorizing him to sell, and to apply the proceeds "to the payment of said loss," enures to the benefit of the ward, and may be enforced by him, on failure of the guardian to pay the amount adjudged against him on final settlement of his accounts. *Ib.* 567.
40. *Trusts for creditors; when equity will assume jurisdiction, at instance of beneficiaries.*—Courts of equity have original jurisdiction of trusts, and will enforce their execution at the instance of the beneficiaries; but, when a general assignment is made by an insolvent bank, for the benefit of its creditors, a court of equity will not at once assume jurisdiction, at the instance of some of the creditors, remove the assignee, and appoint a trustee or receiver in his stead, unless it is shown that the assignee is incompetent or unfit for his office, or that he has been guilty of some neglect or breach of duty. *Jones v. McPhillips*, 314.
41. *Same.*—That the assignee is a young man, and has had but little business experience; that his property is inconsiderable when compared with the value of the property conveyed by the assignment, while he was not required to give bond; that he was a director of the bank at the time the assignment was made, and also during the period of the mismanagement of its affairs, which resulted in its insolvency, through excessive loans to its president against bitter opposition in the board of directors—these facts, as alleged, are not sufficient to justify his removal, at the instance of creditors, and the appointment of a receiver in his stead, when it does not appear that he participated in the alleged mismanagement, or voted with the majority in favor of the excessive loans to the president; and when it does appear that he has already offered to give, and has given bond for the faithful performance of his duty. *Ib.* 314.

CHANCERY—*Continued.*

42. *Requiring bond of assignee, or trustee.*—A trustee, or assignee, in a deed of assignment for the benefit of creditors, though relieved from giving bond by the instrument itself, may be required to give bond by the beneficiaries of the deed (Code, § 3735); and when it appears that he has offered to give bond, and has done so under the order of the court, the fact that the assignment did not require a bond is no reason for removing him, at the instance of the creditors, and appointing a receiver of the property in his stead. *Ib.* 314.
43. *Trustees appointed by court; extent of powers.*—In the exercise of its jurisdiction over trustees, their appointment and removal, a court of equity may invest its appointees with all the powers requisite for the discharge of the duties of the trust; but it can not confer upon them powers merely discretionary, or powers resting on personal trust and confidence, unless such powers are attached to the office of trustee, or are conferred by the instrument creating the trust on the acting trustee. *Gosson v. Ladd*, 224.
44. *Executor and trustee acting without authority; bill for account and settlement.*—When a sole acting executor undertakes the management of the estate, and the execution of the personal trusts created and conferred by the will on both of the persons named as executors, although he acts without authority, he renders himself liable as a trustee; and he may be required to account in equity at the suit of the remainder-man. *Werborn v. Austin*, 381.
45. *Trust funds; when followed into hands of third person.*—Trust funds may be followed into the hands of a third person, so long as they can be satisfactorily traced and identified, although he has taken the title to the property purchased with them in his own name; but, to authorize this relief, the facts must be averred with distinctness and precision, and must be proved by full, clear, and convincing evidence. *McCall v. Rogers*, 349.
46. *Protection to mortgagee, as bona fide purchaser.*—A mortgagee of property purchased with trust funds, if he had no notice of that fact, and is a *bona fide* purchaser for value, is entitled to protection against the implied trust arising from such investment of the trust funds; but, if the debt secured by the mortgage is tainted with usury, he is not a *bona fide* purchaser for valuable consideration. *Ib.* 349.
47. *Vendor's lien; when mortgagee may claim protection against, as purchaser without notice.*—When the heirs and distributees of an intestate's estate voluntarily make an agreement among themselves for a division of the lands, each executing to the administratrix his note for the agreed value of the land allotted to him, to be paid and adjusted on final settlement of the estate, liens being retained and declared on each one's portion for his indebtedness; although the agreement is not recorded, the administratrix may enforce a vendor's lien against one portion of the land, as against a mortgagee of the heir to whom it was allotted, to the extent of the interest acquired by him under the agreement; but, as to the interest therein inherited by the mortgagor, the mortgagee may claim protection as a purchaser without notice, if he is also a purchaser for value. *Jones & DePras v. Robinson*, 499.
48. *Same; when mortgagee is purchaser for value.*—A mortgage, when given only to secure an antecedent debt, does not entitle the mortgagee to protection in equity as a purchaser for valuable consideration; but, when given to secure a debt contemporaneously contracted, or in consideration of the extension of an antecedent debt, this makes a valuable consideration, and entitles the mortgagee to such protection. *Ib.* 499.

CHANCERY—*Continued.*

PLEADING AND PRACTICE.

49. *Who are necessary parties to bill ; general rule.*—The general rule is, that all persons who are interested, legally or beneficially, in the subject-matter of the suit, whose rights or interests are affected, or sought to be concluded by the decree, are necessary parties to the bill ; and persons who are shown to have once had an interest, which would be materially affected by the decree, must be brought in as parties, unless it is also shown that their interest has ceased, or has become vested in some other person who is a party.—*Perkins, Livingston & Post v. Brierfield Iron & Coal Co.*, 403.
50. *Same ; mortgagees, and assignees.*—Junior mortgagees are necessary parties to a bill filed by judgment creditors, seeking to set aside a prior mortgage, or to have it declared a general assignment, asserting a superior lien on the property conveyed, and asking to have it sold for the satisfaction of their judgments ; and an averment that another person, who is made a party, claims to be the owner of the junior mortgage, does not obviate the necessity of bringing in the mortgagee himself, as the holder of the legal title. *Ib.* 403.
51. *Husband and wife as parties.*—The 15th Rule of Chancery Practice, requiring bills by married women, in reference to their separate estates, to be filed in their names alone, without joining their husbands, fell with the statute on which it was founded, and which was abrogated by its omission from the Code of 1876 ; and since its abrogation, the husband must be joined with his wife as a complainant in a suit relating to her statutory estate. *Werborn v. Austin*, 381.
52. *Wife as party to bill filed by her trustee ; amendment as to parties.* The wife is a proper party to a bill filed by her testamentary trustee, which seeks to set aside and cancel a mortgage of her property executed by her and her husband to secure a recited indebtedness ; and if she is joined as a defendant with her husband and the mortgagees, her name may be struck out by amendment, and she may then be made a co-complainant with the trustee. *Tatum Brothers v. Walker*, 563.
53. *Parties to bill for settlement, when guardian is dead, and his estate insolvent.*—In the absence of statutory provisions, the death of the guardian, and the insolvency of his estate, furnish a sufficient reason for the omission to make his personal representative a party to a bill filed by the ward against the surety on his official bond, or the personal representative of the deceased surety, to compel an account and settlement ; and the statute now authorizing a suit against one or more of several joint obligors without joining the others (Code, § 3754), such a bill may be maintained without alleging the insolvency of the estate of the deceased guardian. *Fulgham v. Herstein*, 476.
54. *Parties to bill by statutory commissioners, for administering assets of municipal corporation.*—Under the statutes dissolving the municipal corporation of the city of Selma, providing for the appointment of commissioners to administer its assets as trustees, and creating a new corporation as its successor, the new corporation being bound to pay the debts and liabilities of its predecessor, it is a necessary party to a bill filed by the statutory commissioners under the provisions of said prior act under which they were appointed. *Amy & Co. v. Selma*, 103.
55. *Multifariousness.*—A bill filed by simple-contract creditors (Code, § 3886), seeking to set aside, on the ground of fraud, a conveyance executed by their deceased debtor to his wife, and to subject the property to the satisfaction of their debts, and also to compel the

CHANCERY—Continued.

settlement of a subsequent assignment by the debtor for the benefit of his creditors, to remove the trustee, and to have a receiver appointed for the assets in his hands, is multifarious, since the debtor's wife has no interest in the litigation concerning the property conveyed by the assignment, and the assignee has no interest in the litigation about the property conveyed to her. *Seals v. Pfeiffer & Co.*, 278.

56. *Same*.—A creditor, having recovered separate judgments against the principal debtor and his surety, and seeking by bill in equity to subject to the satisfaction of the judgment against the surety a tract of land to which he had the legal title when the debt was contracted, but which, in fraud of his creditors, he afterwards conveyed to his principal; the bill is not multifarious because the heirs of the deceased principal are made parties, the legal title being vested in them, and no relief being prayed as to the judgment against their ancestor. *Larkin v. Mead*, 485.
57. *Pleadings construed against pleader*.—Pleadings must be reasonably certain, and when assailed by demurrer, if susceptible of more than one construction, that construction must be adopted which is least favorable to the pleader. *Jones v. McPhillips*, 314.
58. *Filing bill in double aspect, asking cancellation of mortgage, or redemption under it*.—A bill can not pray to have a mortgage set aside and cancelled, as inoperative and void, or, in the alternative, for an account and redemption under it; and if the original bill prays the former relief only, an amendment asking the other, in the alternative, can not be allowed. *Tatum Brothers v. Walker*, 563.
59. *Alternative averments, as to consideration of conveyance assailed for fraud*.—In a creditor's bill seeking to set aside a conveyance on the ground of fraud, alternative averments as to the consideration of the deed are permitted, when each averment makes the conveyance fraudulent, and entitles the complainant to the same relief. *Proskauer v. People's Savings Bank*, 257.
60. *Allegations of creditor's bill for discovery*.—A judgment creditor, having an unsatisfied execution, may file a bill in equity for discovery and relief under the statute (Code, § 3882), without alleging fraud on the part of his debtor, or the concealment of his property with intent to hinder, delay, or defraud his creditors; and he may frame its allegations in the alternative. *Floyd v. Floyd*, 353.
61. *Same*.—If the bill alleges that, at the time of the rendition of the complainant's judgment, the defendant owned and held lands particularly described; that he and his wife have conspired to defraud complainant; that the wife now pretends to own and hold the lands, with all the other property belonging to her husband; and that if he ever executed to her any deed or other writing, it was executed after the complainant's right had accrued, was without valid consideration, and executed with intent to defraud complainant; these allegations are not equivalent to an averment of a fraudulent conveyance by the debtor to his wife. *Ib.* 353.
62. *Tender in bill to redeem*.—In a bill to redeem under a mortgage, it is always necessary to tender the amount due, unless it is averred that nothing is in fact due; and the only safe plan is to tender what may be found due, even when averring that nothing is due. *Tatum Brothers v. Walker*, 563.
63. *Same*, in bill for special performance; when necessary or proper. *Carlisle v. Carlisle*, 339.
64. *Variance between allegations and proof*.—Where the bill alleges that the complainants, married women, own the lands in controversy, or their respective interests therein, "as their separate estate under the married women's law of Alabama," while the evidence shows

CHANCERY—Continued.

- that their interests are held under a conveyance which creates an equitable estate, the variance is fatal. *Webb v. Robbins*, 176.
65. *Same*.—Where the bill is filed to compel a conveyance of the legal title, in the nature of a bill for specific performance, and avers that a deed was executed to the complainants' ancestor by the trustee to whom the property had been conveyed creating a naked trust, and that this deed was executed at the instance of the two beneficiaries of the estate, on a sale made by them jointly, in payment of a debt due by them jointly; while the proof shows that the sale was made by one of them only, and the conveyance executed at his instance, without the knowledge, assent, or subsequent approval of the other,—there is a fatal variance between the allegations and the proof. *Webb v. Crawford*, 440.
66. *Statute of non-claim*; when available as defense on demurrer. *Grimball v. Mastin*, 553; *Larkin v. Mead*, 485.
67. *Answer, as evidence against co-defendant*.—The unsworn answer of one defendant is not admissible as evidence against another; and admissions contained in the answer of the grantee, that the conveyance was intended only as a mortgage to secure the repayment of borrowed money, can not be received as evidence against the grantor, or a subsequent assignee for the benefit of creditors, when the conveyance is assailed for fraud, on the ground that it was intended only as a mortgage. *Danner Land & Lumber Co. v. Stonewall Insurance Co.*, 184.
68. *Answer as cross-bill between co-defendants*.—The answer of one defendant may be taken and considered as a cross-bill, as against the complainant in the original bill (Code, §§ 3801-02), but not as against another defendant, against whom it prays affirmative relief; yet, if the complainant answers it as a cross-bill, without objecting to the irregularity, all objection to it is thereby waived, and the irregularity is not available on error. *Jones & DePras v. Robinson*, 409.
69. *Hearing on bill and answer*.—As against creditors of the husband existing at the time of the execution of a conveyance by him to his wife, the *onus* is on her to show the payment of a valuable consideration; but an indebtedness on his part, for moneys belonging to her statutory estate, by him received and converted, or appropriated to his own uses, is a valuable consideration; and where such consideration is set up in an answer under oath to a bill for discovery, and in response to special interrogatories attached to the bill, and the hearing is on bill and answer only, the complainant is not entitled to a decree subjecting the lands to the satisfaction of his debt. *Floyd v. Floyd*, 353.
70. *Re-examination of witness*.—It is irregular to re-examine a witness without an order of court, the granting of which is matter of discretion with the chancellor; and if a deposition is thus taken without authority of an order, it is discretionary with the chancellor whether he will suppress the deposition or not; and the exercise of this discretion, in either case, is not revisable on error or appeal. *Meyer Bros. v. Mitchell*, 312.
71. *Remandment on reversal, for amendment*.—When the chancellor overrules a demurrer to a bill, and this court, on appeal, reverses his judgment, a final decree will not be here rendered, but the cause will be remanded, in order that the complainant may have an opportunity to amend his bill, if he desires to do so. *Jones v. McPhillips*, 314.
72. *Revision of chancellor's decision on evidence*.—The chancellor's decision on a disputed question of fact, as on the question of notice *vel non*, will not be disturbed by this court on appeal, unless the record clearly shows that it is wrong. *Sawyers v. Baker*, 461.

CHANGE OF VENUE.

1. *Refusal of ; how revisable.*—To enable this court to revise the refusal of an application for a change of venue in a criminal case (Sess. Acts 1884-85, p. 140), the point must be duly reserved by bill of exceptions, and a recital of an exception in the judgment-entry only is not sufficient. *Jones v. The State*, 98.

CHARGE OF COURT TO JURY.

1. *Abstract charge ; presumption in favor of judgment.*—An abstract charge given, which asserts a correct legal proposition, will not work a reversal ; and when the bill of exceptions does not purport to set out all the evidence, this court will presume, if necessary to support a charge given, that there was evidence justifying it. *Littleton v. Clayton*, 571.
2. *Charge as to law 'abhorring subterfuge and evasion.'*—As an abstract proposition, "the law abhors subterfuge, and despises mean dodges and evasion ;" but a charge, asserting the proposition, is not abstract, when the bill of exceptions states evidence showing conduct on the part of the defendant which may be thus characterized. *Ib.* 571.
3. *Ambiguous charge, or charge requiring explanation.*—A charge requested, which is ambiguous, or tends to confuse the jury, or requires explanation or qualification, is properly refused. *Railroad Co. v. Bayliss*, 430.
4. *Charge cautioning jury against prejudice or partiality, or using disrespectful language.*—While it is the duty of a juror to discard all prejudice or partiality, and to render a conscientious verdict without regard to consequences ; and while it may sometimes be proper, or even necessary, that the presiding judge should impress upon the jury the necessity of a fearless discharge of this duty ; yet a charge requested, assuming that they intend to disregard their oath and duty, or couched in language otherwise disrespectful to them, is properly refused. *Ib.* 430.
5. *Giving charge as requested ; rule as to error without injury not applicable.*—Charges asked, if in writing, "must be given or refused in the terms in which they are written" (Code, § 3109) ; and when a charge asked is improperly refused, the doctrine of error without injury can not be invoked, because the court had already given a charge asserting substantially the same legal proposition. *Ib.* 430.
6. *Charges asked and refused, but not shown to be in writing.*—The refusal of charges asked, which are not shown to have been asked in writing, is not available on error. *King v. The State*, 94.
7. *Charge misplacing burden of proof.*—When the evidence is conflicting as to a material fact, a charge misplacing the burden of proof must work a reversal, without regard to the preponderance of the evidence. *Spira v. Hornthall & Co.*, 137.
8. *Charge objectionable for generality, or calculated to mislead jury.*—When a charge asserts a correct legal proposition, but is calculated to mislead the jury, or is objectionable for generality, neither the giving nor the refusal of it is an error which will work a reversal, since the party supposing himself injured by it may protect himself by asking an explanatory or more specific charge. *McKleroy v. The State*, 95 ; also, *Union Refining Co. v. Barton*, 148 ; *Tesney v. State*, 33.
9. *Charges requested, tending to mislead, or ignoring material facts.*—A charge requested, which, when applied to the evidence, has a tendency to mislead the jury, or withdraws from their consideration any material fact which the evidence tends to establish, is properly refused. *Tesney v. The State*, 33.
10. *General charge, invading province of jury.*—What is a reasonable

CHARGE OF COURT TO JURY—*Continued.*

- time being a mixed question of law and fact, largely dependent on the particular facts of each case, must always be submitted to the jury, under appropriate instructions; and when the testimony is not clear, and free from conflict on material points, a general charge in favor of either party is an invasion of the province of the jury. *Insurance Companies v. Felrath*, 194.
11. *Same*.—Where the plaintiff claims the money in controversy under a deed of gift from her husband, which is assailed on the ground of fraud in fact, the issue of fraud *vel non* is a question for the jury, and a general charge in favor of the defendant is an invasion of their province. *Seals v. Holloway's Adm'r*, 344.
 12. *Province of court and jury, as to meaning of forged instrument*. While it is the province and duty of the court to interpret and construe writings, and to instruct the jury as to their legal meaning and effect; yet the writing alleged to have been forged being apparently signed *G. W. McGowen*, which the indictment alleged meant and was intended for *G. W. McGowen*, a charge instructing the jury that the order "purports to be signed by *G. W. McGowen*" is an invasion of their province. *Baysinger v. The State*, 63.
 13. *General exception to charges given or refused*.—A general exception to several charges given can not be sustained, unless each one of them is erroneous; nor can a general exception to the refusal of several charges asked be sustained, unless each one of them asserts a correct legal proposition, which is applicable to the evidence. *Bedwell v. Bedwell*, 587.

CODE OF ALABAMA.

1. Statutes omitted from Code. *Sawyers v. Baker*, 381.
2. § 164. Official bonds of county officers. *State v. Flinn*, 100.
3. § 410. Stub-book kept by tax-collector. *Britton v. State*, 202.
4. § 434. Abstract-book kept by probate judge. *Britton v. State*, 202.
5. §§ 652-54. Special and adjourned terms of Circuit Courts. *Martin v. State*, 1.
6. § 768. Appointment of constable. *Street v. McClerkin*, 580.
7. § 1500. Special exemption from road duty. *Lewin v. State*, 45.
8. §§ 1699, 1700. Duties of railroad engineers, and liability of company for injuries to persons or property. *Railroad Co. v. Bayless*, 429; *Railroad Co. v. Carlos*, 443; *Clements v. Railroad Co.*, 553.
9. § 2121. Statute of frauds. *Martin v. Blanchett*, 388; *Coleman & Carroll v. Hatcher & Brannon*, 217.
10. § 2138. Contracts made on Sunday. *Tamplin v. Still's Adm'r*, 374.
11. § 2185. Naked trusts. *Gosson v. Ladd*, 223; *Webb v. Crawford*, 440.
12. § 2349. Grant of administration. *Burchett v. Treese*, 528.
13. § 2414. Revocation of letters of administration. *Watson v. Glover*, 323.
14. § 2432. Administrator's note, given for debt of estate. *McCalley v. Wilburn & Co.*, 547.
15. § 2568. Filing claims against insolvent estate. *Cunningham v. Lindsay*, 510.
16. §§ 2637-40. Foreign administrators. *Burchett v. Treese*, 528.
17. § 2709. Contracts between husband wife. *Harden v. Darwin & Pulley*, 473.
18. § 2711. Wife's statutory estate; for what debts liable. *Grantham v. Payne*, 584.
19. §§ 2715-16. Right of dower, as affected by separate estate. *Lee v. Lee*, 412.
20. § 2831. Declaration and claim of exemption. *Todd v. McCraw*, 468.

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21. §§ 2834, 2842. Claim of exemption; where filed. *Todd v. McCravy*, 468.
22. §§ 2846-48. Waiver of exemptions. *Knox v. Wilson*, 309; *Wagnon v. Keenan*, 519.
23. §§ 2877-81. Redemption of real estate. *Holden v. Rison & Co.*, 515; *Seals v. Pfeiffer & Co.*, 278; *Caldwell v. Smith*, 157.
24. § 2890. Who may sue as party really interested. *Insurance Companies v. Felrath*, 195.
25. § 2911. Discontinuance in action against several defendants. *Slade v. Street*, 576.
26. § 2997. Plea of tender. *Caldwell v. Smith*, 157.
27. § 3018. Struck jury. *Railroad Co. v. Thompson*, 448.
28. § 3043. Certificate of register of land-office. *Bonner v. Phillips*, 427.
29. § 3058. Competency of party as witness, in actions by or against administrators. *McDonald v. Jacobs*, 524.
30. § 3109. Charges to jury. *Railroad Co. v. Bayliss*, 429.
31. § 3121. Appeals from justice's court. *Littleton v. Clayton*, 571.
32. §§ 3124, 3129. Costs and damages. *Baker v. Keith*, 544.
33. § 3156. Amendment by striking out parties. *Caldwell v. Smith*, 157.
34. § 3173. Failure to issue execution for ten years. *Perkins, Livingston & Post v. Brierfield Iron & Coal Co.*, 403.
35. § 3210. Lien of execution, and how continued. *Ib.* 403.
36. § 3219. Garnishment in pending action. *Seals v. Holloway's Adm'r*, 344.
37. § 3240. Partial payment avoiding statute of limitations. *Grimball v. Mastin*, 554.
38. § 3242. Fraud avoiding statute of limitations. *Proskauer v. People's Savings Bank*, 257.
39. § 3286-7. Advances to make crop. *Hamilton v. Maas & Brother*, 283.
40. § 3302. Summons to claimant, in garnishment case. *Nat. Com. Bank v. Miller & Co.*, 168.
41. § 3341. Statutory claim suit. *Graham v. Hughes*, 590.
42. §§ 3467-72. Landlord's lien, and remedy by attachment. *Hamilton v. Maas & Brother*, 283; *Gunter v. DuBose*, 326; *Thompson v. Powell*, 391.
43. § 3647. Execution issued by justice of the peace, sent into another county. *Street v. McClerkin*, 580.
44. § 3654. *Certiorari* to justice's judgment. *Grantham v. Payne*, 584.
45. §§ 3696-7. Forcible entry, and unlawful detainer. *Littleton v. Clayton*, 571; *King v. Bolling*, 594.
46. § 3705. Three years possession, as bar to such action. *King v. Bolling*, 594.
47. § 3735. Requiring bond of trustee. *Jones v. McPhillips*, 315.
48. § 3754. Parties to suit on joint demand. *Fulgham v. Herstein*, 496.
49. §§ 3801-02. Answer as cross-bill. *Jones & De Pras v. Robinson*, 499.
50. §§ 3870-76. Summary execution on injunction bond. *McCalley v. Wilburn & Co.*, 549.
51. §§ 3882-86. Creditor's bill for discovery, and relief against fraud. *Floyd v. Floyd*, 353; *Seals v. Pfeiffer & Co.*, 278.
52. § 3908. Personal decree on foreclosure of mortgage. *McCall v. Rogers*, 349.
53. § 3925. When appeal is returnable. *Webb v. Robbins*, 176.
54. § 3998. Warrant of arrest on verdict of coroner's jury. *Boynton v. State*, 29.
55. § 4003. Inquest held by justice as coroner. *Boynton v. State*, 29.
56. § 4185. Bigamy. *Parker v. State*, 47.
57. §§ 4207, 4209. Gaming. *Chambers v. State*, 80.

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- 58. § 4266. Embezzlement by tax-collector. *Britton v. State*, 202.
- 59. § 4325. Enticing servant or apprentice. *Driscoll v. State*, 84.
- 60. § 4408. Malicious injury to animals. *Busby v. State*, 66.
- 61. § 4417. Trespass to realty. *Pippen v. State*, 81.
- 62. § 4693. Justices sitting together. *Boynton v. State*, 29.
- 63. § 4739. Organization of jury at special term. *Martin v. State*, 1.
- 64. § 4874. Special venire in capital cases. *Martin v. State*, 1; *De Arman v. State*, 1; *Jackson v. State*, 18.
- 65. § 4881. Competency of juror. *Jackson v. State*, 18.
- 66. § 4900. Abusive words in extenuation. *Prior v. State*, 56.
- 67. Forms of indictments. *Parker v. State*, 47; *Baysinger v. State*, 63; *Britton v. State*, 202.

COMMON CARRIERS. See RAILROADS.

CONCEALED WEAPONS. See CRIMINAL LAW, 13.

CONFLICT OF LAWS.

1. *Exemption; by what law determined, and value in 1867.*—As against the claims of creditors, the extent and amount of exemptions are to be determined by the law which was of force when their debts were created; and under the laws which were of force prior to the 19th February, 1867, a debt of money in the hands of a garnishee could not be claimed as exempt. *Todd v. McCravey's Adm'r*, 469.
2. *Foreign grant of administration.*—If the deceased plaintiff was in fact domiciled in another State at the time of his death, and letters of administration are there granted on his estate, the foreign administrator thereby acquires no title to the assets here, nor any right to revive and prosecute the suit, without a compliance with statutory provisions (Code, §§ 2637-40); and any arrangement between him and the distributees, for the collection and distribution of the estate, can not bar the further prosecution of the action by the administrator appointed here. *Barclift v. Treece*, 528.

CONSTABLE.

1. *Sale by constable; irregularities not rendering void.*—A sale under execution by a special constable, whose appointment was unauthorized (Code, § 768), is not void; and though it is irregular, if made in a precinct and county other than that of the defendant's residence (Code, § 3637), it is not void. *Street v. McClerkin*, 589.

CONSTITUTIONAL LAW.

1. *Dissolution of municipal corporation; effect on existing debts and liabilities.*—The act of the General Assembly approved December 11th, 1882, entitled "An act to vacate and annul the charter, and to dissolve the corporation of the city of Selma, and to provide for the application of the assets to the payment of the debts thereof" (Sess. Acts 1882-3, pp. 221-32), operated a dissolution of said municipal corporation, and withdrew from it all governmental power, except so far as the continued exercise of such power was thereby specially authorized; but, as to the debts and liabilities then existing against said corporation, said act was without any legal operation whatever, their obligation being neither extinguished nor lessened thereby. *Amy & Co. v. Selma*, 103.
2. *Same; appointment of trustees for administration of assets, with power to file bill in equity.*—Said act is not objectionable, in authorizing the appointment of commissioners by the governor, and conferring on them power to take charge of and collect the assets of the dissolved corporation, and apply them as by law required;

CONSTITUTIONAL LAW—*Continued.*

- nor in authorizing said commissioners to file a bill in the City Court of Selma, for the instructions and protection of said court in the performance and discharge of their duties; nor in conferring jurisdiction of the case on that court, nor in the mode of procedure prescribed. *Ib.* 103.
3. *Same; effect of act in taking governmental power from people.*—Said act does not contemplate a deprivation, permanent or temporary, of the people residing within the territorial limits of said corporation, of the power of local government as they had been accustomed to exercise it, nor a suspension or cessation of such government for any appreciable period of time; but, on the contrary, plainly contemplates the creation of another municipal corporation, to which substantially the same people and the same territory would be subject. *Ib.* 103.
 4. *Same; subsequent act creating new corporation as successor.*—The subsequent act approved February 17th, 1883, entitled "An act to incorporate the inhabitants and territory formerly embraced within the corporate limits of the municipal corporation (since dissolved) styled the *City of Selma*, and to establish a local government therefor" (Sess. Acts 1882-3, pp. 396-432), is an execution of the intent manifested by said prior act, and a re-organization of the same corporators and substantially the same territory; and said new corporation, as the successor of the old, is bound to the payment of its debts, and the satisfaction of its liabilities. *Ib.* 104.
 5. *Former jeopardy.*—When a judgment of conviction in a criminal case has been arrested, set aside, or reversed on error or appeal, at the instance of the defendant, it can not be pleaded in bar of another prosecution for the same offense, such action on his part being regarded as an express waiver of his constitutional privilege not to be placed in jeopardy a second time. *Morrisette v. State*, 71.
 6. *General Assembly; length of session under constitutional provisions.* The constitutional provision limiting the sessions of the General Assembly to fifty days (Art. IV, § 5) has been construed by successive legislatures to mean fifty legislative working days, excluding Sundays and other days on which, by concurrent resolution, the two houses do not sit; and the court adopts this construction. *Moog v. Randolph*, 597; *Sayre v. Pollard*, 608.
 7. *Judicial notice of legislative journals.*—The courts take judicial notice of the journals kept by the two houses of the General Assembly, and are authorized to search them for the purpose of ascertaining whether a particular statute, included in the printed volume published by authority, was enacted in accordance with the forms prescribed by constitutional provision. *Ib.* 597, 608.
 8. *Variance between approved (or enrolled) and original bill.*—A material variance, in substance and legal effect, between the enrolled bill which was signed by the governor, and the bill which actually passed the General Assembly, as shown by the journals of the two houses, is fatal to the validity of the enactment as a law. *Ib.* 597, 608.
 9. *Same; Revenue Law of Feb. 23d, 1883.*—The revenue law approved February 23d, 1883, as signed by the governor, imposed a tax on "all money loaned and solvent credits, or credits of value" (Sess. Acts 1882-3, p. 71, § 5, subd. 7), without any deduction of the taxpayer's indebtedness, while the bill which actually passed the two houses of the General Assembly, as shown by their journals, contained a clause expressly authorizing such deduction, and taxing the surplus only; and this variance destroys the validity of the entire enactment. (Stoke, J., doubting.) *Moog v. Randolph*, 597.
 10. *Same.*—In the act providing for the assessment and collection of taxes, and defining the duties of the officers engaged in the assess-

CONSTITUTIONAL LAW—*Continued.*

ment and collection, approved February 23d, 1883, the 57th section, as approved by the governor, require the tax-collector to give notice of his appointments in each precinct, by publication in a newspaper, "or by bills posted at five or more public places," while said section of the bill passed by the General Assembly, as shown by the journals of the two houses, required notice by publication "and by bills posted," &c.; and this variance destroys the validity of the entire enactment. (STONE, J., doubting.) *Sayre v. Pollard*, 608.

CONTINUANCE.

1. *Application for continuance, and admission as to testimony of absent witness; what is revisable.*—Applications for a continuance, or requiring an admission as to the alleged testimony of an absent witness, are addressed to the discretion of the trial court, and its action is not revisable on error or appeal. *De Arman v. The State*, 10.
2. *Equitable relief against judgment at law; refusal of continuance on account of sickness.*—An application for a continuance is addressed to the discretion of the primary court, and its refusal is neither revisable on error or appeal, nor ground for equitable relief against the judgment; consequently, the defendant can not obtain equitable relief against the judgment on the ground that he was prevented by sickness from attending and making defense at the trial term, when it appears that his attorney asked a continuance on that ground, and the court refused it. *Campbell v. White*, 397.

CONTRACTS.

1. *Distinction between express and implied contracts.*—Express and implied contracts are alike founded on the actual agreement of the parties, and the only distinction between them lies in the mode of proof. *City Council v. Water Works Co.*, 248.
2. *Contract with corporation for supplying water for use against fire.* Plaintiff having undertaken, by special contract, to supply defendant, a municipal corporation, through fire-plugs, or hydrants, with water for use in the extinguishment of fires, for which defendant agreed to pay a specified price per year, in monthly installments, for each hydrant; a recovery may be had for the agreed price, whether any water was actually used by the defendant or not, if plaintiff kept on hand water of suitable quality, and in quantity sufficient for the prescribed uses. *Ib.* 248.
3. *Same; use of water after termination of contract.*—If the defendant continued, after the termination of such special contract, to use the water in the same manner, and for the same purposes as before, without giving notice of an intention not to submit to the same terms and conditions, the law would imply a promise to pay the same price fixed by the special contract; and a resolution adopted by the defendant, a copy of which was served on the plaintiff, neither admitting nor denying the special contract, but objecting to the quality and quantity of the water furnished, and declaring that nothing would be paid for the water used until these defects were remedied, does not rebut this implication, when it appears that the defendant continued to use the water as before. *Ib.* 248.
4. *Promise to one person, for benefit of another.*—When a person has in his hands money belonging to another, or owes him a debt previously contracted, a request by the creditor that he will pay the money, or any part of it, to a third person to whom he is indebted, or a written order to that effect, without any present valuable con-

CONTRACTS—*Continued.*

- sideration, does not change the ownership of the debt or money, and will not support an action by such third person to recover it; but, where the purchaser of goods agrees, at the time of the sale, to pay the purchase-money by satisfying debts due from the vendor to third persons, the promise enures to the benefit of those third persons, is supported by a valuable consideration which takes the case out of the statute of frauds, and may be enforced by them by action in their own name; and a creditor of the vendor can not, by garnishment sued out before their acceptance of the promise, intercept the money as belonging to their debtor. *Coleman & Carroll v. Hatcher & Brannon*, 217.
5. *Contract for performance of personal services; discharge before expiration of term; offer of continued employment at less wages.*—When a person is employed for a specified term, at stipulated monthly wages, and is discharged before the expiration of the term, his acceptance of continued service at less wages would be a modification of the original contract, and an abandonment of any claim to more; consequently, his rejection of the offer neither prejudices his right of action, nor reduces the amount of his recovery. *People's Co-operative Association v. Lloyd*, 387.
 6. *Contract between manufacturing company and agent for sale of goods, construed; rights and duties of respective parties.*—Under an executory contract between a private corporation, engaged in the business of refining cotton-seed oil at Montgomery, Alabama, and an agent employed to introduce and establish a market for the sale of its oils in Georgia; by which it was stipulated that, for three years, the agent was to have the sole right of selling the company's oils in Georgia, through himself and his sub-agents, was to pay the expenses of himself and his agents, was to receive as compensation ten per cent. of the amount of his sales, and was to be subject to the orders of the company; *held*, that the company was necessarily bound, in the exercise of good faith in carrying out the objects and purposes of the contract, to furnish the oils with which to fill the agent's contracts; that its orders, to which the agent was subject, related to the matter of making sales, the mode and manner of delivery and payment, and the price to be charged for the oils; that these orders were to be given in good faith, in honest promotion of the common undertaking; and that, in regulating the price, the company was neither required to sell its oils at a loss, nor authorized to raise the price above a fairly remunerative profit, which would defeat or substantially hinder sales, in order to get rid of the agency. *Union Refining Co. v. Barton*, 148.
 7. *Same; subsequent order as to sales for cash or on credit.*—A letter written by the company to the agent, a few months after the inception of the contract, saying, "In all cases, have buyers remit by post-office order, if possible, on delivery, as we prefer it in all cases, and do not mention thirty days acceptance, except in extreme cases, and be sure they are all good men,"—is not a modification of the contract, but a reasonable order, to which the agent was bound to conform in making future sales; and it authorized him to sell on thirty days time, only when such indulgence was necessary to effect a sale, and only to solvent purchasers. *Ib.* 148.
 8. *Same; revocation of license to sell on credit.*—The agent objecting to this restriction, as not authorized by the contract, and replying that he did not guaranty any sales made on credit; a letter then written to him by the company, saying, "Henceforth you are not authorized to sell bills that you do not guaranty," is a revocation of the former license to sell on thirty days time to solvent purchasers, and takes away the agent's right to sell on credit without becoming himself the guarantor of the bills. *Ib.* 148.

CONTRACTS—*Continued.*

9. *Sunday contracts; loan or deposit of money.*—A loan of money on Sunday is void as a contract, unless brought within some one of the statutory exceptions (Code, § 2138); but, when money is deposited on that day, not for use, but for safe-keeping, the liability of the person receiving it dates only from his subsequent conversion, or his failure or refusal to return it on demand; and the depositor may waive the tort, and maintain an action for money had and received, although the deposit was made on Sunday. *Tamp- lin v. Still's Adm'r*, 574.
10. *Raffle, or lottery; when winner may recover from bailee.*—The winner at a raffle can not maintain an action against the person who has the possession of the article, until there has been a constructive delivery to him, by which the legal title would be vested, and all inquiry into the illegality of the transaction would be precluded; but, if the defendant, holding possession as bailee for the winner, denies plaintiff's right to recover because he does not produce the winning ticket, plaintiff is entitled to recover on proof of the loss of the ticket and his ownership of it. *Koppersmith v. Nassau*, 385.
11. *Subsequent promise to pay debt already barred.*—A debt which is barred by the statute of limitations, is a sufficient consideration to support a subsequent promise to pay it, if such promise is expressed as required by the statute; and a debt of the ancestor, which is a charge on his lands, though barred by the statute of limitations, will support a subsequent promise to pay by the heirs or devisees. *Grimball v. Mastin*, 553.

CORONER.

1. *Warrant of arrest, founded on coroner's inquest; justice of the peace acting as coroner.*—A warrant of arrest may be issued on the verdict of a coroner's jury (Code, § 3998), and a justice of the peace may act as coroner when that officer "is absent from the county, or unable to act" (*Ib.* § 4003); and when an inquest is held by a justice as coroner, a warrant of arrest founded on the verdict will support the jurisdiction of a committing magistrate, when collaterally assailed, no objection having been raised to the proceedings by motion to quash or otherwise, although it is not affirmatively shown that the coroner was absent, or unable to act. *Boydton v. The State*, 29.

CORPORATION.

1. *Dissolution of municipal corporation; effect on existing debts and liabilities.*—The act of the General Assembly approved December 11th, 1882, entitled "An act to vacate and annul the charter, and to dissolve the corporation of the city of Selma, and to provide for the application of the assets to the payment of the debts thereof" (Sess. Acts 1882-3, pp. 221-32), operated a dissolution of said municipal corporation, and withdrew from it all governmental power, except so far as the continued exercise of such power was thereby specially authorized; but, as to the debts and liabilities then existing against said corporation, said act was without any legal operation whatever, their obligation being neither extinguished nor lessened thereby. *Amy & Co. v. Selma*, 103.
2. *Same; appointment of trustees for administration of assets, with power to file bill in equity.*—Said act is not objectionable, in authorizing the appointment of commissioners by the governor, and conferring on them the power to take charge of and collect the assets of the dissolved corporation, and apply them as by law required; nor in authorizing said commissioners to file a bill in equity in the City Court of Selma, for the instructions and protection of said

CORPORATION—*Continued.*

- court in the performance and discharge of their duties; nor in conferring jurisdiction of the case on that court, nor in the mode of procedure prescribed. *Ib.* 103.
3. *Same; effect of act in taking governmental power from people.*—Said act does not contemplate a deprivation, permanent or temporary, of the people residing within the territorial limits of said corporation, of the power of local government as they had been accustomed to exercise it, nor a suspension or cessation of such government for any appreciable period of time: but, on the contrary, plainly contemplates the creation of another municipal corporation, to which substantially the same people and the same territory would be subject. *Ib.* 103.
 4. *Same; subsequent act creating new corporation as successor.*—The subsequent act approved February 17th, 1883, entitled "An act to incorporate the inhabitants and territory formerly embraced within the corporate limits of the municipal corporation (since dissolved) styled the *City of Selma*, and to establish a local government therefor" (Sess. Acts 1882-3, pp. 396-432), is an execution of the intent manifested by said prior act, and a re-organization of the same corporators and substantially the same territory; and said new corporation, as the successor of the old, is bound to the payment of its debts, and the satisfaction of its liabilities. *Ib.* 103.
 5. *Same; parties to bill.*—The new corporation being bound to pay the debts and liabilities of its predecessor, it is a necessary party to a bill filed by the statutory commissioners under the provisions of said prior act under which they were appointed. *Ib.* 103.
 6. *Same; action against new corporation, on judgment against predecessor.*—An action at law may be maintained against said new corporation, as the successor of the former, on a judgment recovered against the former before dissolution. *Ib.* 103.

COSTS.

1. *In actions for torts, and appeals from magistrates.*—In an action to recover damages for a tort, if the plaintiff does not recover more than twenty dollars, he can recover no more costs than damages, in the absence of a certificate by the presiding judge that he ought to have recovered more (Code, § 3129); but this provision does not apply to actions commenced in a justice's court, and removed by appeal or *certiorari* into the Circuit Court, as to which special provision is made for the taxation or apportionment of the costs (Code, § 3124). *Baker v. Keith*, 544.

COURT, CIRCUIT.

1. *Special and adjourned terms; order setting day for trial.*—Where the record shows that the trial was had at an extra term of the court, which was called and held in strict conformity with the statutory provisions regulating both special and adjourned terms (Code, §§ 652, 654; Sess. Acts 1874-5, p. 201; *Ib.* 1875-76, p. 210), and on the day specified in the orders calling said extra term; it is no objection to the regularity of the proceedings, that the order fixing the day for trial was made on the day before the final adjournment of the regular term, while the order for the adjourned term was not made until the next day, and just before the adjournment; nor is it necessary that an order should be made at said extra term, setting a day for the trial. *Martin v. The State*, 1.

COURT, PROBATE.

1. *Jurisdiction*, in matter of probate of wills. *Acklen v. Goodman*, 521.
2. *Same*, in grant of administration. *Barelift v. Treece*, 528.

COURT, SUPREME.

1. *Conclusiveness of decision on lower court.*—A decision of the Supreme Court, duly entered of record, and properly certified to the court from which the appeal was taken, is conclusive on that court, and can not be there assailed on account of errors or defects which do not render it void on its face; the only remedy being by petition, or other appropriate proceeding, in the Supreme Court. *Donnell v. Hamilton*, 610.
2. *Power over judgment after expiration of term.*—The Supreme Court can not set aside a judgment or decree rendered by it, after the expiration of the term at which it was rendered, unless the same is void on its face. *Ib.* 610.
3. *Special court.*—When two of the justices of the Supreme Court are disqualified to sit in a cause, the parties may consent, by agreement entered of record, that the case shall be submitted to the decision of the remaining justice, and that his decision shall be entered up as the decision of the court; or that two attorneys of the court, named in the agreement, shall be associated with him, and that the decision of the three, or a majority of them, shall be entered up as the judgment of the court; and if one of the attorneys so selected dies before judgment is rendered, the decision of the justice and the surviving attorney, afterwards rendered, and regularly entered up as the judgment of the Supreme Court, is valid and binding on the parties, and can neither be assailed in the court below, to which the cause is remanded by judgment and certificate regular on their face, nor in the Supreme Court after the expiration of the term at which it is regularly entered. *Ib.* 610.

CRIMINAL LAW.

ARREST, AND BAIL: PRELIMINARY EXAMINATION.

1. *Warrant of arrest, founded on coroner's inquest; justice of the peace acting as coroner.*—A warrant of arrest may be issued on the verdict of a coroner's jury (Code, § 3998), and a justice of the peace may act as coroner when that officer "is absent from the county, or unable to act" (*Ib.* § 4003); and when an inquest is held by a justice as coroner, a warrant of arrest founded on the verdict will support the jurisdiction of a committing magistrate, when collaterally assailed, no objection having been raised to the proceedings by motion to quash or otherwise, although it is not affirmatively shown that the coroner was absent, or unable to act. *Boynton v. The State*, 29.
2. *Proceedings of justices on preliminary investigation, when acting outside of beat, or one is incompetent to sit.*—When a justice of the peace issues a warrant of arrest, returnable before himself, he may associate with him, on the trial of the preliminary investigation, "one or more magistrates of equal grade" (Code, § 4693); and it is no objection to the validity of their proceedings when thus sitting, that the associate justices are acting outside of their respective beats or precincts; nor are their proceedings void, because one of the associates was incompetent to sit. *Ib.* 29.
3. *Jurisdiction of justice of the peace, in criminal cases.*—While a justice of the peace is sitting for the trial of a case on its merits, whether civil or criminal, it may be that his court is one of limited or inferior jurisdiction, and that nothing will be intended to be within its jurisdiction except what affirmatively appears from the papers and proceedings in the cause; but, when the justice is sitting as an examining court, on the preliminary investigation of a criminal charge, this principle does not apply, and it is not necessary that his authority to act should affirmatively appear on the face of the

CRIMINAL LAW—*Continued.*

proceedings, in order to support their validity when collaterally assailed. *Ib.* 29.

4. *Application for bail or discharge on habeas corpus; burden of proof.* On an application for a discharge or bail by a person who is in confinement under an indictment for murder, he is presumed to be guilty of murder in the first degree, unless that presumption is overcome by the evidence adduced; and the indictment being produced, the defendant must take the initiative, and rebut the presumption arising therefrom. *Ex parte Rhear*, 92.

ASSAULT.

5. *Assault with intent to murder; constituents of offense; presumption of malice, from use of deadly weapon.*—Every assault with intent to kill is not necessarily an assault with intent to murder; there must be malice in the attempt. But, when the assault is made with a deadly weapon, in sufficient proximity to inflict a deadly wound, the law implies malice from the use of such weapon, and casts on the defendant the *onus* of proving that the assault was in self-defense, or that the killing, if consummated, would not have been murder; unless these defensive facts are shown by the testimony which proves the assault. *Williams v. The State*, 53.
6. *Election.*—In a prosecution for an assault with intent to murder, if the testimony of the prosecutor shows two distinct assaults upon him by the defendant, each being an attempt to shoot him with a gun within shooting distance, and the interval between the two being too great to constitute them parts of one and the same transaction, the prosecution should be required to elect between the two offenses. *Ib.* 53.

BIGAMY.

7. *Sufficiency of indictment.*—An indictment for bigamy must aver that the second marriage was unlawful, and it is not sufficient to aver that the defendant, "having a former wife living, married A. B." *Parker v. The State*, 47.
8. *Proof of former marriage.*—In a prosecution for bigamy (Code, § 4185), the fact of a former marriage, valid by the laws of the country in which it was contracted, must be proved by competent evidence, and beyond a reasonable doubt; but it may be proved by the admissions or confessions of the defendant, in the absence of any evidence of statutory regulations on the subject, without the production of a record, or the testimony of a person who was present, the sufficiency of such admissions or confessions being a question for the determination of the jury. *Ib.* 47.
9. *Proof that former wife (or husband) was still living.*—The prosecution must prove, also, that the former wife (or husband) was living at the time the second marriage was contracted; but this may be proved by circumstantial evidence, and positive evidence is not indispensable. *Ib.* 47.
10. *Same; presumption as to continuance of life, or death from absence for five years.*—When the prosecution has proved that the former wife (or husband) was alive at a specified time before the second marriage, a presumption arises in favor of the continuance of life, and it is then incumbent on the defendant to prove death, or a continuous absence for the period prescribed by the statute (Code, § 4186); and if he left his wife in the State in which they were married, her continued residence there is not *absence* within the meaning of the statute. *Ib.* 47.

CRIMINAL LAW—Continued.

BURGLARY.

11. *Breaking and entering corn-crib; proof of value of corn, and charge as to.*—That the use of corn as food for horses and mules constitutes value, is a fact which all men are presumed to know; and the court may charge the jury, that they may conclude the corn was valuable, if the proof shows that it was used to feed horses or mules; and circumstantial proof being sufficient, if strong and convincing to the satisfaction of the jury, may refuse to instruct them that the fact that the corn had value must "be positively proved by the evidence." *Miller v. The State, 41.*
12. *Same; breaking and entering, as elements of offense.*—The corn having been abstracted from the crib by the defendant, by thrusting his arm through an opening between the chinks, if he made or enlarged the opening for the purpose, this would constitute a sufficient breaking as an element of burglary; but, if the opening was neither made nor enlarged by him, though he thrust in his arm and took out the corn, and might thereby be guilty of larceny, he would not be guilty of burglary. *Ib. 41.*

CARRYING CONCEALED WEAPONS.

13. *Charge as to evidence for consideration of jury.*—Under an indictment for carrying concealed weapons (Code, § 4109), the witnesses for the prosecution testifying that they saw the defendant with a pistol in his hand, presenting it at another person, but did not see how or whence he procured it, although they had been working with him for several hours; while the defendant himself stated to the jury that it was placed on a car which he was using, by a friend, who informed him of threats made by the person with whom he had the difficulty, and was picked up from the car at the moment; a charge requested, asserting that the jury, "in determining whether the defendant got the pistol from his person or elsewhere, can take into consideration his surroundings," is correct, and its refusal is error. *Alsop v. The State, 87.*

EMBEZZLEMENT.

14. *By tax-collector; statutory provisions construed as to elements of offense.*—The failure "to make returns and forward the tax-money in his hands, from time to time, to the proper authorities, as provided by law," as these words are used in the statute (Code, § 4266), "comprises the duty of making monthly reports of collections, and monthly payments of taxes collected, both State and county, in the manner, and at the times specified in sections 417-18;" and this is made a felony, without regard to the amount of default, although the failure to make a final settlement, on or before the first day of May in each year, is only a misdemeanor under section 4265. *Britton v. The State, 202.*
15. *Averment as to amount embezzled.*—An indictment against a tax-collector for the embezzlement of public funds, in failing to make returns, and forward the tax-money in his hands, from time to time, to the proper authorities, as provided by law (Code, § 4266), must allege some particular sum, or amount, as to which the offense is charged; but it is sufficient to allege that it is "about" a named sum, and it is not necessary to prove the precise sum specified. *Ib. 202.*
16. *Averment of collection, or possession; liability for act of agent.*—To be sufficient as a charge of felony, the indictment must allege, also, that the money was "at the time" in the hands of the tax-collector; since, if collected by a deputy, though the principal

CRIMINAL LAW—*Continued.*

- might be liable civilly, he would not be liable criminally, unless the money came to his actual possession. *Ib.* 202.
17. *Averment negating "good cause" or excuse.*—The existence of any good cause or excuse for the alleged failure or default is defensive matter only, and it is not necessary that the indictment shall negative it by averment. *Ib.* 202.
 18. *"Abstract-book," and "stub-book," admissibility as evidence.*—The "abstract-book" of property and polls assessed, which the probate judge is required to make and file with the tax-collector (Code, § 434), is admissible evidence against the collector, when properly identified; and the "stub-book," required to be kept by the collector himself (Code, § 410), is also competent evidence against him, as an admission of a most solemn character. *Ib.* 202.
 19. *Judgment in civil suit; admissibility as evidence in criminal prosecution.*—A judgment recovered against a defaulting tax-collector and his sureties, in a civil action at the suit of the county, is not competent evidence against him in a subsequent criminal prosecution for the default. *Ib.* 202.
 20. *Criminal intent as element of offense.*—Since a criminal intent, or *animus furandi*, is a necessary element of the crime of larceny, a person can not be convicted of larceny (or embezzlement), if he takes the property of another under the honest belief that it is his own; but "an impression that he had a claim or property in it," is not the equivalent of an honest belief, and does not negative a criminal intent. *Morrisette v. The State*, 71.

ENTICING MINOR, OR APPRENTICE.

21. *Constituents of offense.*—Under the statute amending section 4325 of the Code, and providing, among other things, that any person "who knowingly interferes with, hires, employs, entices away, or induces any minor to leave the service of any person to whom that service is lawfully due," &c., is guilty of a misdemeanor; a conviction can not be had against a father, who, having hired his minor son to another person for a specified term, induces his son to leave the service before the expiration of the term. (STONE, C. J., doubting.) *Driscoll v. The State*, 84.

EVIDENCE.

22. *Confession, or admission implied from silence.*—The statement of the justice of the peace before whom the preliminary examination of the defendant was had, testifying as a witness on the trial, "that he explained the charge to the defendant, and asked him if he desired to make a statement; that, after defendant made his statement, witness told him his own statement would convict him, and defendant made no reply,"—is not a confession, or admission implied from silence, and is not competent evidence against the defendant. *Weaver v. The State*, 26.
23. *Charges as to measure of proof.*—In criminal cases, while absolute or mathematical certainty is not required, to authorize a conviction, the evidence must produce a conviction of the truth of the charge with that degree of certainty on which the mind reposes with satisfaction; and while "reasonable doubt," and "moral certainty," as used in this connection, are correct expressions, "it is possible," or "it may be," or "perhaps" the defendant is not guilty, as used in charges requested, imply only a possible or imaginary doubt, and the charges are properly refused. *McKleroy v. The State*, 95.
24. *Charges as to reasonable doubt, and probability of innocence.*—A charge asserting that "reasonable doubt, and to a moral certainty,

CRIMINAL LAW—Continued.

does not mean to an absolute or mathematical certainty, but means an actual and substantial doubt growing up out of the evidence;" and that a "probability of the defendant's innocence means more than a possibility that he is not or may not be guilty," is free from error. *Martin v. The State*, 1.

25. *Proof of foot-prints*.—A witness who measured tracks found at the place where the offense was committed, and compared them with tracks made by the defendant on the next day, may state that they "corresponded;" but he can not be asked whether a particular shoe, which he had seen on defendant's foot, "would have made" such a track as that found at the place. *Busby v. The State*, 66.
26. *Proof of character*.—As tending to show the character of the deceased as a turbulent and violent man, a witness may be asked if he had not heard that the deceased, a short time before he was killed, had "had several rows and shooting scrapes in another county." *Tesney v. The State*, 33.
27. *Same*.—A witness for the defense having testified to the general character of the deceased as a turbulent, violent, and dangerous man, he may be asked, on cross-examination, "if he had not heard some say that he was a kind and obliging man and a good neighbor;" but not, "if he had not heard men in his neighborhood say he was a kind neighbor;" nor, "if he had not heard some good reports about him;" the second question being too narrow and restricted, and the third too general. *Jackson v. The State*, 18.
28. *As to presumption arising from failure to adduce evidence, or to call witness*.—No presumption arises, unfavorable to the prosecution in a criminal case, from the failure to examine all the witnesses to the transaction, or every person to whom a dying declaration was made. *Ib.* 18.
29. *Judgment in civil suit; admissibility as evidence in criminal prosecution*.—A judgment recovered against a defaulting tax-collector and his sureties, in a civil action at the suit of the county, is not competent evidence against him in a subsequent criminal prosecution for the default. *Britton v. The State*, 202.

FALSE PRETENSES.

30. *Offer to refund*.—Under an indictment for obtaining money under false pretenses (Code, § 4370), evidence of the fact that the defendant offered, two or three weeks after the money was obtained, to refund it with interest, is not relevant or competent evidence for the defense. *Carlisle v. The State*, 71.
31. *Plea of former conviction*.—An indictment for the forgery of a written order for money, and for uttering such order as true, knowing it to be forged, and an indictment for obtaining money on such order by falsely pretending that it was written by the person whose signature to it was forged, on their face charge separate and distinct offenses; and a plea of former conviction under the first, setting out the indictment and the verdict of the jury, and averring that the offense charged in the second "is based upon, and is of the same transaction as alleged in the first indictment," without more, does not show the identity of the two charges as one offense. *Baysinger v. The State*, 60.

FORGERY.

32. *Forged instrument; sufficiency to support indictment, with averment of extrinsic facts*.—An order written dimly in pencil, asking the person to whom it was addressed to send by the bearer, who was the defendant, "\$450 cents," and signed by a name which appears

CRIMINAL LAW—Continued.

- to be *G. W. McGowe*, has the capacity to deceive, and is sufficient to support an indictment for forgery, with the additional averments that the amount called for was intended for four dollars and fifty cents, and that the name signed to it meant *G. W. McGowen*. *Baysinger v. The State*, 63.
33. *Declarations of defendant, when delivering forged instrument*.—The declarations of the defendant on delivering the order to the person to whom it was addressed, that it was written by *McGowen*, are admissible as evidence against him, as a part of the *res gestæ* connected with the act of utterance, and as supporting the averment of the indictment that the name signed to the order meant *McGowen*. *Ib.* 63.
34. *Province of court and jury, as to meaning of forged instrument*. While it is the province and duty of the court to interpret and construe writings, and to instruct the jury as to their legal meaning and effect; yet the writing alleged to have been forged being apparently signed *G. W. McGowe*, which the indictment alleged meant and was intended for *G. W. McGowen*, a charge instructing the jury that the order "purports to be signed by *G. W. McGowen*" is an invasion of their province. *Ib.* 63.
35. *Forgery of an order for money, or uttering forged order as true, and obtaining money by false pretenses on such order*.—An indictment for the forgery of a written order for money, and for uttering such order as true knowing it to be forged, and an indictment for obtaining money on such order by falsely pretending that it was written by the person whose signature to it was forged, on their face charge separate and distinct offenses; and a plea of former conviction under the first, setting out the indictment and the verdict of the jury, and averring that the offense charged in the second "is based upon, and is of the same transaction as alleged in the first indictment," without more, does not show the identity of the two charges as one offense. *Baysinger v. The State*, 60.
36. *Relevancy of evidence as to amount due to defendant by drawer of forged order*.—Under an indictment for forgery in falsely altering and raising an order for merchandise, evidence of the fact that, at the time the order was given, the drawer owed the defendant more than the sum specified in the order, is not relevant or admissible for any purpose. *Bush v. The State*, 83.

GAMING.

37. *Playing at cards, and betting; variance*.—Under an indictment for betting at a game of cards (Code, § 4209), a conviction can not be had on proof of playing only (§ 4207), the two offenses being separate and distinct. *Chambers v. The State*, 80.

HOMICIDE.

38. *Murder and manslaughter*.—To reduce a homicide from murder to manslaughter, the killing must not only have been perpetrated without malice, express or implied, but must also have been done in a sudden heat of passion, upon reasonable provocation, or in mutual combat. *Prior v. The State*, 56.
39. *Former difficulty, as part of res gestæ*.—When it appears that the deceased was killed in a rencounter with the defendant, caused by the latter's interference in another difficulty, immediately preceding it, between the deceased and a third person, whose quarrel the defendant espoused, the two difficulties constituting but one continuous transaction, it is competent for the prosecution to prove the former difficulty, as explanatory of the homicide. *Ib.* 56.

CRIMINAL LAW—*Continued.*

40. *Self-defense; charges asked, ignoring inquiry as to who brought on the difficulty.*—On a trial for murder, charges asked as to the doctrine of self-defense, ignoring all inquiry as to who was in fault in bringing on the difficulty, are properly refused. *Ib.* 56.
41. *Same; charge asked, ignoring apprehension of imminent danger.* Charges asked, asserting the defendant's right to kill, "if the deceased attacked him with a knife, and was cutting at him;" or, "if the deceased had him down, and had his knife in his hand," but ignoring the question of a reasonable apprehension of real or apparent danger to life or limb, are properly refused. *Ib.* 56.
42. *Abusive language at time of difficulty.*—As to abusive language used by a person assaulted or beaten, at or near the time of the difficulty, which may be good "in extenuation or justification as the jury may determine" (Code, § 4900), the statute applies only to prosecutions for assault, assault and battery, and affray. *Ib.* 56.
43. *Self-defense.*—A conspiracy on the part of the deceased and another to take the life of the defendant, and an attempt to carry it into effect, do not justify the killing on the ground of self-defense, unless the attempt was attended with an actual or seeming ability to effect its purpose, and the danger was, or appeared to be, so imminent that it could not be otherwise eluded, or, at least, could not be eluded by flight, or other attempted escape, without exposing the party assailed to greater peril. *Henderson v. The State*, 77.
44. *Same; retreat.*—A charge requested, which instructs the jury that they must acquit the defendant, "if they believe from the evidence that the circumstances at the time of the killing were such as to create in the mind of the accused a reasonable belief of imminent danger to life or limb caused by the deceased," is properly refused, because it "pretermits all mention of other modes of escape which may have been open to the defendant, and to which, if available, it was his duty to have resorted before taking life." *Ib.* 77.
45. *Abusive words, or passion thereby excited, in excuse or mitigation of homicide.*—Mere words, however offensive, are not provocation sufficient to free a homicide from the charge of murder; nor can passion, excited by the use of such words, have any greater effect, though it is relevant to the question of malice, and may, in a proper case, reduce the killing to manslaughter; and under an indictment for murder, a conviction being authorized for any less offense necessarily included in that charged (Code, § 4904), charges asked, claiming an acquittal on account of such passion, are properly refused. *Jackson v. The State*, 18.
46. *Self-defense.*—The essential elements of self-defense, as established by repeated decisions of this court, are: 1st, that the defendant must be free from fault—must not say or do anything for the purpose of provoking a difficulty, nor be unmindful of the consequences, in this respect, of any wrongful word or act; 2d, there must be a present impending peril to life, or danger of great bodily harm, either real, or so apparent as to create the *bona fide* belief of an existing necessity; and, 3d, there must be no convenient or reasonable mode of escape, by retreat, or by declining the combat. *Ib.* 18.
47. *Self-defense.*—The decisions of this court, as to the doctrine of self-defense, have settled these principles: that, to excuse the taking of human life, there must exist a present, pressing necessity to prevent the commission of a felony, or the infliction of great bodily harm, or such apparent necessity as would create, in the mind of a reasonable and prudent man, a belief that such necessity actually existed; that the defendant, if he was the aggressor, or was in-

CRIMINAL LAW—*Continued.*

- strumental in bringing on the difficulty, is precluded from setting up the plea of self-defense; and that, if the deceased was the assailant, the defendant must have retreated, unless retreat would have endangered his safety, or there was no reasonable mode of escape. *Tesney v. The State*, 33.
48. *Same; charge as to.*—A charge which instructs the jury that, "before the defendant can successfully set up the plea of self-defense, he must show a pending and pressing necessity to strike," is erroneous, because it ignores the sufficiency of an apparent necessity. *Ib.* 33.
 49. *Presumption of malice from use of deadly weapon.*—The use of a deadly weapon, from which the law infers malice, casts on the defendant the *onus* of disproving it, unless the presumption is rebutted by the proved circumstances attending the killing; but the presumption may be rebutted by other evidence than that which proves the killing. *Ib.* 33.
 50. *Proof of distance between parties when shot was fired.*—For the purpose of showing the distance between the parties when the deceased first fired a pistol at the defendant, as indicated by the marks of powder on the clothes, or the want of such marks, it is not permissible to exhibit to the jury a coat similar to that worn by the defendant at the time, and show the effect of a single experiment in firing at it. *Ib.* 33.
 51. *Proof of character of deceased.*—As tending to show the character of the deceased as a turbulent and violent man, a witness may be asked if he had not heard that the deceased, a short time before he was killed, had "had several rows and shooting scrapes in another county." *Ib.* 33.
 52. *Same.*—A witness for the defense having testified to the general character of the deceased as a turbulent, violent, and dangerous man, he may be asked, on cross-examination, "if he had not heard some say that he was a kind and obliging man and a good neighbor;" but not, "if he had not heard men in his neighborhood say he was a kind neighbor;" nor, "if he had not heard some good reports about him;" the second question being too narrow and restricted, and the third too general. *Jackson v. The State*, 18.
 53. *Charges as to malice, provocation of the difficulty, retreat, and self-defense*, ten in number, to which exceptions were reserved by the defendant, held to be in strict harmony with many former rulings of this court, which are cited. *Martin v. The State*, 1.
 54. *Proof of former difficulty; admissibility of entire conversation, when part has been received.*—Proof of a previous altercation or difficulty between the defendant and the deceased, a few days before the killing, is admissible evidence against the defendant, though the particulars or merits of that difficulty can not be inquired into; yet, when the prosecution has proved the defendant's subsequent declarations relative to that difficulty, in the nature of threats, and the defendant has proved other parts of his declarations in the same conversation, the prosecution may call for all that was said at the time by the defendant as to the former difficulty. *Ib.* 1.
 55. *Declarations of deceased; when admissible as res gestæ.*—The declarations of the deceased, made to his wife, when leaving home on the morning of the killing, that he was going to a specified place, are competent evidence on the principle of *res gestæ*. *Ib.* 1.
 56. *Declarations of defendant; when not admissible.*—The declarations of the defendant, made on the day before the killing, to the effect that he desired to be on friendly terms with the deceased, and would give the witness \$50 if he would effect a reconciliation between them, are not competent evidence for him. *Ib.* 1.

CRIMINAL LAW—*Continued.*

57. *Defendant's declarations; when admissible as evidence for him in rebuttal.*—Who brought on the difficulty being a controverted question of fact, and the prosecution having adduced evidence tending to show that the defendant went to the place for the purpose of killing the deceased: it is permissible for the defendant to show, in rebuttal, his refusal to go to the place when first asked, the reasons assigned at the time for his refusal, and the circumstances under which he went soon afterwards. *Tesary v. The State*, 33.
58. *What witness, testifying negatively as to words used, may state as to his position.*—A witness who was present at the encounter between the defendants and the deceased, and who testifies that he did not hear the deceased curse or swear as he rode up to the place where the others were, as another witness testified he had done, may further state that he was in such position at the time that, if the words had been used, he could have heard them; being subject to cross-examination as to the particular facts, which would show to what weight his testimony was entitled. *Ib.* 33.
59. *Malice and self-defense; charges as to.*—A homicide can not be committed with malice and premeditation, and yet in self-defense; and charges asked, asserting, by implication, that the defendant is entitled to an acquittal on the ground of self-defense, although he acted with malice and premeditation, are contradictory, self-repugnant, and calculated to mislead. *De Arman v. The State*, 10.
60. *Retreating to avoid homicide; charge as to.*—Whether the party assailed could have retreated conveniently and safely, without apparently putting himself at a probable disadvantage, is a question of fact for the decision of the jury; and a charge asked, which asserts as matter of law, on certain facts hypothetically stated, that he was not bound to retreat, is properly refused. *Ib.* 10.

INDICTMENT.

61. *For bigamy.*—An indictment for bigamy must aver that the second marriage was unlawful, and it is not sufficient to aver that the defendant, "having a former wife living, married A. B." *Parker v. The State*, 47.
62. *Embezzlement by tax-collector; averment as to amount embezzled.*—An indictment against a tax-collector for the embezzlement of public funds, in failing to make returns and forward the tax-money in his hands, from time to time, to the proper authorities, as provided by law (Code, § 4265), must allege some particular sum, or amount, as to which the offense is charged; but it is sufficient to allege that it is "about" a named sum, and it is not necessary to prove the precise sum specified. *Britton v. The State*, 202.
63. *Same; averment negating "good cause" or excuse.*—The existence of any good cause or excuse for the alleged failure or default is defensive matter only, and it is not necessary that the indictment shall negative it by averment. *Ib.* 202.
64. *Same; averment of collection, or possession.*—To be sufficient as a charge of felony, the indictment must allege, also, that the money was "at the time" in the hands of the tax-collector; since, if collected by a deputy, though the principal might be liable civilly, he would not be liable criminally, unless the money came to his actual possession. *Ib.* 202.
65. *Forgery.*—An order written dimly in pencil, asking the person to whom it was addressed to send by the bearer, who was the defendant, "\$450 cents," and signed by a name which appears to be *G. W. McGraw*, has the capacity to deceive, and is sufficient to support an indictment for forgery, with the additional averments that the amount called for was intended for four dollars and fifty cents,

CRIMINAL LAW—Continued.

and that the name signed to it meant *G. W. McGowen. Bay-singer v. The State*, 63.

JURORS AND JURY.

66. *Organization of grand jury; recitals construed as to number of jurors appearing and serving.*—When the record, in its caption, contains these recitals: "The sheriff returned into court the *venire facias* commanding him to summon the following named persons to serve as grand jurors, to-wit," setting out the names of eighteen persons, and among them C. H. Spencer, T. R. Sylvester, Hugh McLean, and D. McDonald; "of whom fifteen appeared to serve, and C. H. Spencer was appointed foreman, who, with the other qualified citizens (except T. R. Sylvester, Hugh McLean, and D. McDonald, who was excused by the court), competent as grand jurors, were duly sworn," &c.; these recitals show, with sufficient certainty, that the three jurors named were excused from service, and that the remaining fifteen were sworn and organized into a grand jury. *Martin v. The State*, 1.
67. *Special venire in capital case, at special or adjourned term.*—When the order setting the day for the trial at the special or adjourned term directs "that the names of fifty competent persons be drawn and summoned for the trial of this case," and the order for the adjourned term also directs that the same number be drawn "to serve as petit jurors at said adjourned term"; and the jury is organized, without objection, from the *venire* thus drawn and summoned (Code, §§ 4739, 4874), there is no irregularity which is available on error. (STONE, C. J., "inclining to the opinion, that section 4739 should be held to apply to all extra terms, whether special or adjourned.") *Ib.* 1.
68. *Special venire; when required or authorized.*—A special *venire* is only authorized, or necessary, in capital cases (Code, § 4874); and under an indictment for murder, the defendant having been convicted, on the first trial, of murder in the second degree (which is not a capital offense), he is not entitled to demand a special *venire* on his second trial, if the former judgment is properly pleaded. *De Arman v. The State*, 10.
69. *Same; who are "regular jurors" for the week.*—In summoning a special *venire* for the trial of a capital case, which must include the "regular jury," or "those summoned on the regular juries of the week" (Code, §§ 4872, 4874), these terms mean only those persons who were summoned as regular jurors and are in attendance; and neither those who failed to attend, nor those who were excused, nor talesmen, can be included, unless again specially summoned. *Jackson v. The State*, 18.
70. *Competency of juror, as affected by fixed opinion.*—A person summoned as a juror, who states, on his *voir dire*, that he has a fixed opinion as to the guilt of the defendant, which would bias his verdict, if the facts proved were as he had heard them, but, if the facts proved differed from what he had heard, he believed he would not be biased, but would act on the facts as proved, is not competent as a juror.—Code, § 4881. (The court is "unwilling to extend the rule in *Bales v. The State*, 63 Ala. 30.) *Ib.* 18.
71. *Challenge of juror for cause; waiver of right.*—The officer before whom the preliminary examination of the defendants was had, and by whom they were committed to jail to await the action of the grand jury, being summoned as a regular juror, and being accepted without objection, after examination by the court, in the presence of the defendants, touching his qualifications as a juror; whether the failure to challenge him was the result of ignorance or inad-

CRIMINAL LAW—*Continued.*

vertence, the right of challenge was lost when he was accepted and sworn as a juror; and a subsequent motion to excuse or set him aside, on his own statement of the facts to the court, saying that he had not recognized the defendants when first examined, and that he had a fixed opinion which would bias his verdict, is addressed to the discretion of the court. *Henry v. The State*, 75.

LARCENY.

72. *Constituents of offense.*—A conviction of larceny can not be had against a person who finds or picks up money which has been lost or dropped by the owner, unless there was a felonious intent contemporaneous with the finding or picking up, though it is not necessary that such intent should be established by positive testimony; but, if the defendant took the money from the person of the owner, or from any place in which he had put it, such taking being tortious, a felonious intent subsequently conceived and executed would constitute larceny. *Weaver v. The State*, 26.
73. *Same; criminal intent.*—Since a criminal intent, or *animus furandi*, is a necessary element of the crime of larceny, a person can not be convicted of larceny (or embezzlement), if he takes the property of another under the honest belief that it is his own; but "an impression that he had a claim or property in it," is not the equivalent of an honest belief, and does not negative a criminal intent. *Morrisette v. The State*, 71.

MALICIOUS MISCHIEF.

74. *Malicious injury to animals; whether acts are distinct offenses, or merely continuous offense.*—Under a prosecution for maliciously disabling or injuring two mules, the property of the prosecutor (Code, § 4408), which were shot by the defendant while trespassing in his corn-field, the interval between the two shots being such a space of time as permitted a person, walking rapidly, to go about a quarter of a mile, the two acts are properly charged as one continuous offense, and there is no ground for compelling an election. *Busby v. The State*, 66.
75. *Malicious trespass on lands; constituents of offense.*—To justify a conviction against a person who "willfully and maliciously commits any trespass on the lands of another, by cutting down or destroying any wood or timber growing thereon" (Code, § 4417), something more than a mere willful trespass must be shown—the act must be willful and malicious; and while malice is not, ordinarily, the subject of positive proof, facts and circumstances must be shown from which it may be inferred that the act was prompted by ill-will, malevolence, grudge, spite, enmity, or wicked intention. *Pippen v. The State*, 81.
76. *Same.*—Where the evidence shows that the trees were cut by the defendant, by the direction of his employer (or his employer's wife, in his absence), who wanted rails to repair a fence, and who told him that he might sell the bark; that his employer owned a strip of the land, having bought from the prosecutor, and that the line between them had never been run, although the prosecutor had pointed out the line as he claimed it, and told defendant he must not cut any trees beyond it; these facts, without more, do not justify the inference of malice, and do not authorize a conviction. *Id.* 81.

PERJURY.

77. *Admissibility of justice's proceedings as evidence.*—On a charge of perjury committed by the defendant while testifying as a witness

CRIMINAL LAW—*Continued.*

during a preliminary investigation of a criminal charge before a justice of the peace, the original papers of the justice showing the proceedings are competent and admissible as evidence to identify them with the proceedings described in the indictment. *Boynton v. The State*, 29.

PLEAS AND DEFENSES.

78. *Former conviction, or acquittal; how pleaded and tried.*—A former conviction or acquittal must be specially pleaded; and when so pleaded, the issue joined on it must, properly, be tried and determined, before the issue on the plea of not guilty is submitted to the jury. *De Arman v. The State*, 10.
79. *Same.*—A former conviction must be specially pleaded, and can not be given in evidence under the plea of not guilty. *Baysinger v. The State*, 60.
80. *Same; certainty requisite in plea.*—A plea of former acquittal, or former conviction, which are among favored pleas, requires only certainty to a common intent in its averments; but it must show the essential identities of person and offense, if not by averment in express terms, at least by the averment of facts which show such identity with reasonable certainty. *Id.* 60.
81. *Plea of former conviction.*—An indictment for the forgery of a written order for money, and for uttering such order as true, knowing it to be forged, and an indictment for obtaining money on such order by falsely pretending that it was written by the person whose signature to it was forged, on their face charge separate and distinct offenses; and a plea of former conviction under the first, setting out the indictment and the verdict of the jury, and averring that the offense charged in the second "is based upon, and is of the same transaction as alleged in the first indictment," without more, does not show the identity of the two charges as one offense. *Baysinger v. The State*, 60.
82. *Former jeopardy.*—When a judgment of conviction in a criminal case has been arrested, set aside, or reversed on error or appeal, at the instance of the defendant, it can not be pleaded in bar of another prosecution for the same offense, such action on his part being regarded as an express waiver of his constitutional privilege not to be placed in jeopardy a second time. *Morrisette v. State*, 71.

RETAILING SPIRITUOUS LIQUORS.

83. *License for retailing liquors; pre-requisites of, and power of probate judge in issuing.*—In issuing a license for retailing spirituous liquors, under the general statutes, a probate judge acts ministerially, and is bound to require a substantial compliance with all the precedent statutory conditions; and while the license itself is *prima facie* evidence of such compliance, the fact of non-compliance, when affirmatively shown, renders the license void; and its invalidity being thus shown, it affords no protection to the person to whom it was granted, and who has acted under it. *Russell v. The State*, 89.
84. *Same; affidavit of applicant.*—The statutory affidavit required of a person applying for a license to retail spirituous liquors (Sess. Acts 1882-3, pp. 36-7), must state, among other things, that the applicant will not knowingly sell or give away vinous or spirituous liquors to any person of known intemperate habits, and will not keep his house open on Sunday for the purpose of carrying on the business; and if the affidavit omits these statements, it does not authorize the issue of a license, and the license itself is void. *Id.* 89.

CRIMINAL LAW—Continued.

TRIAL AND ITS INCIDENTS.

85. *Order setting day for trial.*—Where the record shows that the trial was had at an extra term of the court, which was called and held in strict conformity with the statutory provisions regulating both special and adjourned terms (Code, §§ 652, 654; Sess. Acts 1874-5, p. 201; *Ib.* 1875-76, p. 210), and on the day specified in the orders calling said extra term; it is no objection to the regularity of the proceedings, that the order fixing the day for trial was made on the day before the final adjournment of the regular term, while the order for the adjourned term was not made until the next day, and just before the adjournment; nor is it necessary that an order should be made at said extra term, setting a day for the trial. *Martin v. The State, 1.*
86. *Special venire in capital case.*—When the order setting the day for the trial at the special or adjourned term directs "that the names of fifty competent persons be drawn and summoned for the trial of this case," and the order for the adjourned term also directs that the same number be drawn "to serve as petit jurors at said adjourned term"; and the jury is organized, without objection, from the *venire* thus drawn and summoned (Code, §§ 4739, 4874), there is no irregularity which is available on error. (STONE, C. J., "inclining to the opinion, that section 4739 should be held to apply to all extra terms, whether special or adjourned.") *Ib. 1.*
87. *Same; when required or authorized.*—A special *venire* is only authorized, or necessary, in capital cases (Code, § 4874); and under an indictment for murder, the defendant having been convicted, on the first trial, of murder in the second degree (which is not a capital offense), he is not entitled to demand a special *venire* on his second trial, if the former judgment is properly pleaded. *De Arman v. The State, 10.*
88. *Same; who are "regular jurors" for the week.*—In summoning a special *venire* for the trial of a capital case, which must include the "regular jury," or "those summoned on the regular juries of the week" (Code, §§ 4872, 4874), these terms mean only those persons who were summoned as regular jurors and are in attendance; and neither those who failed to attend, nor those who were excused, nor talesmen, can be included, unless again specially summoned. *Jackson v. The State, 18.*
89. *Application for continuance, and admission as to testimony of absent witness; what is revisable.*—Applications for a continuance, or requiring an admission as to the alleged testimony of an absent witness, are addressed to the discretion of the trial court, and its action is not revisable on error or appeal. *De Arman v. The State, 10.*
90. *Application for change of venue; exception to refusal.*—To enable this court to revise the refusal of an application for a change of venue in a criminal case (Sess. Acts 1884-85, p. 140), the point must be duly reserved by bill of exceptions, and a recital of an exception in the judgment-entry only is not sufficient. *Jones v. The State, 98.*
91. *Polling jury.*—When, in polling the jury, a juror answers that he agrees to the verdict, without other remark or explanation, this court will not presume, for the purpose of imputing error, that he wished to make explanation, merely because the defendant's counsel asked that he be allowed to explain, and the court refused it, the juror himself saying nothing. *Prior v. The State, 56.*
92. *Motion in arrest of judgment; on what grounds founded, and how revised.*—A motion in arrest of judgment must be founded on defects or errors apparent on the face of the record; and when shown

CRIMINAL LAW—*Continued.*

only by bill of exceptions, it can not be considered by this court. *Diggs v. The State*, 68.

VERDICT AND JUDGMENT.

93. *Judgment and sentence; asking defendant if he has aught to say before.* A recital in the judgment-entry, that the defendant was asked, before judgment and sentence was pronounced on him, "if he had anything to say why the judgment of the court should not now be pronounced upon him," shows a substantial compliance with the requirements of the law. *Boynton v. The State*, 29.
94. *Sentence to hard labor for costs; amendment of clerical misprision.* A sentence to hard labor for the non-payment of costs amounting to \$53.95, at forty cents per day, should be for only one hundred and thirty-four days, the fraction over being excluded; but a judgment in excess of this number of days, being a clerical misprision, will be corrected without a reversal. *Morrisette v. The State*, 71.
95. *Same.*—A sentence to hard labor for non-payment of costs, in a criminal prosecution for a misdemeanor, can not exceed eight months, nor fifteen months in a case of felony (Sess. Acts 1880-81, p. 67); but a sentence beyond this limit, being a clerical error, will be corrected by this court, if the record contains no other error. *Miller v. The State*, 41.

DAMAGES.

1. *Profits, as damages for breach of contract.*—In an action for the breach of a contract, by which defendant, a private corporation engaged in the business of refining cotton-seed oil at Montgomery, Alabama, employed plaintiff as its agent to introduce and establish a market for the sale of its oils in Georgia for the term of three years, and to receive as his compensation ten per-cent. of the amount of his sales; the agent can not recover as damages the supposed profits which he would or might have realized from sales during the entire period stipulated for the continuance of the contract. Such damages are entirely speculative, and no rule can be laid down by which they can be accurately ascertained or measured. *Union Refining Co. v. Barton*, 148.
2. *Same; proof of sales made.*—The amount of sales made by the plaintiff, while engaged in the business of the agency, is competent evidence for him, as tending to furnish a basis for fixing his compensation for the services rendered, but not as affording a guide for estimating future or prospective profits. *Ib.* 148.
3. *Contract for performance of personal services; discharge before expiration of term; offer of continued employment at less wages.*—When a person is employed for a specified term, at stipulated monthly wages, and is discharged before the expiration of the term, his acceptance of continued service at less wages would be a modification of the original contract, and an abandonment of any claim to more; consequently, his rejection of the offer neither prejudices his right of action, nor reduces the amount of his recovery. *People's Co-operative Association v. Lloyd*, 387.

DEEDS AND CONVEYANCES.

1. *Conveyance to county for "court-house purposes;" what uses are allowable.*—When a town lot, adjoining that on which the court-house is located, is conveyed to the county as a corporation, "to have and to hold so long as the said party of the second part shall use the same for court-house purposes," and with condition that it shall revert to the grantor, "whenever the said party of the

DEEDS AND CONVEYANCES—*Continued.*

- second part ceases to use said lot for court-house purposes," the condition is not broken by any incidental or collateral use to which the lot may be temporarily devoted, which does not conflict with its continued use for court-house purposes; as, by the failure to inclose it entirely with a fence, allowing hitching-posts for public use to be erected on the uninclosed portion, or a temporary structure for posting bills. *Henry v. Etowah County*, 538.
2. *Description of personal property conveyed.*—A mortgage which conveys "all of the crops of corn, cotton and cotton-seed, and crops of every other name and description, to be grown this year in said county," is not void for uncertainty, but is valid and operative to convey all the crops grown in said county by the grantor or mortgagor. *Hamilton v. Maas & Brother*, 283.
 3. *Description of land, in agreement to sell and convey; parol evidence in aid of.*—As held in this case on the former appeal (75 Ala. 475), an agreement to sell and convey a parcel of land, part of a larger tract, described in the written agreement as "sixty acres Comida and cane-bottom, also ten acres hill-side woodland adjoining the Mitchell tract," is, on its face, void for uncertainty; but parol evidence may be received to aid the uncertain description, and to identify the particular land intended to be sold, which was pointed out at the time, and of which the purchaser was put in possession. *Meyer Bros. v. Mitchell*, 312.
 4. *Same; sufficiency of extraneous evidence identifying land sold.*—The particular lands intended to be sold being described in the amended bill with sufficient certainty, and the plat and survey made by the county surveyor, at the instance of the purchaser, corresponding substantially with this description, and its correctness not being impeached by any contradictory evidence; this is sufficient to sustain the chancellor's decree granting a specific performance, although the lands were pointed out to the surveyor by the complainant himself, and the survey was made without notice to the defendants. *Ib.* 312.
 5. *Deed construed, as to power of sale conferred on trustee.*—In a deed by which the grantor covenants to stand seized of certain property, real and personal, for certain declared uses and purposes (namely, the payment of his debts, the joint use of himself and his wife during life, with further provisions for her children and grandchildren), a power of sale in these words: "And the said John P. N. shall at all times have the sole and absolute right to sell and dispose of the estate hereby conveyed to the uses aforesaid, and on giving adequate security to invest the proceeds according to the terms of this deed,"—does not repose on personal trust and confidence, but is attached to the office of trustee, and intended for the benefit of the trust estate; and it may be exercised by a subsequent trustee, appointed by a court of equity. *Gosson v. Ladd*, 224.
 6. *Conveyance of lands to married woman; character of estate.*—A conveyance of lands to a married woman, without any words showing an intention to exclude her husband's marital rights, vests in her a statutory estate. *Lee v. Lee*, 412.
 7. *Conveyance to married woman, "to her only proper use and behoof."* A conveyance of lands to a married woman, "to her only proper use and behoof," excludes the marital rights of her husband, and creates in her an equitable estate, as distinguished from a statutory estate. *Webb v. Robbins*, 176.
 8. *Conveyance of lands with restriction as to use.*—The owner of lands, in making a sale and conveyance of them, may reserve and retain a servitude or easement in them, or impose restrictions upon their use by the purchaser or his assigns, deemed injurious to the use

DEEDS AND CONVEYANCES—*Continued.*

or value of the vendor's adjoining lands; and when such restrictions are not in general restraint of trade, nor otherwise illegal, they may follow the lands in the hands of subsequent purchasers with notice. *Ib.* 176.

DEPOSITION.

1. *Affidavit for deposition; sufficiency in identifying cause.*—When an affidavit, made by the attorney of H. J. as administrator of S. J., deceased, for taking a deposition, describes the cause as "a cause now pending in said Probate Court, in the matter of the final settlement of the estate of S. J., deceased;" this is sufficient to identify it as a proceeding, then pending in said court, for the final settlement of the accounts of J. M., deceased, as administrator of said S. J.'s estate, between his personal representative and said H. J. as administrator *de bonis non*; especially in the absence of proof of any other cause or proceeding, then pending in said court, with which it might be confounded. *McDonald v. Jacobs*, 524.
2. *Re-taking deposition, without order of court.*—When a deposition is re-taken by the same party, without an order of court allowing it, a motion to suppress it, on that ground, is addressed to the discretion of the court, and its refusal is not revisable on error. *Ib.* 524.
3. *Re-examination of witness.*—It is irregular to re-examine a witness without an order of court, the granting of which is matter of discretion with the chancellor; and if a deposition is thus taken without authority of an order, it is discretionary with the chancellor whether he will suppress the deposition or not; and the exercise of this discretion, in either case, is not revisable on error or appeal. *Meyer Bros. v. Mitchell*, 312.

DETINUE.

1. *Proof of defendant's possession.*—In detinue, or the corresponding statutory action, the plaintiff is not entitled to recover, unless it is shown or admitted that the defendant had possession at the commencement of the suit; but, when the bill of exceptions shows it was proved that a purchaser at constable's sale, the validity of which is attacked, sold the property to the defendant soon afterwards, and there is no proof of any subsequent change in the possession, this court can not say that the jury were not authorized to find that the possession continued in him. *Street v. McClerkin*, 580.

DISCONTINUANCE.

1. *Actions against joint trespassers; discontinuance.*—A plaintiff may, at his election, maintain a separate action against each of several joint trespassers, or a joint action against all, though he can have but one satisfaction; and if he elects to bring a joint action, he may "sue out an *alias* summons, or discontinue as to those on whom the summons is not served, and proceed to judgment against those on whom it has been executed" (Code, § 2911); but the statute does not authorize him to sue out an *alias* summons as to one not served, take a final judgment by default against another, and continue as to a third who appears and pleads; and by such judgment the entire cause is discontinued. *Slade v. Street*, 576.

DOWER.

1. *Widow's right of dower, as affected by separate estate.*—To bar or reduce the widow's right of dower in her husband's lands, on account of other lands belonging to her in her own right (Code, §§ 2715-16), they must be held by her as a statutory estate, as distinguished from one that is equitable. *Lee v. Lee*, 412.

EJECTMENT.

1. *Who is proper party plaintiff; amendment by striking out parties.* A statutory action in the nature of ejectment must be brought in the name of the person who holds the legal title; and if he is described in the summons and complaint as suing for the use of another person, these words may be struck out, by amendment (Code, § 3156), as surplusage. *Caldwell v. Smith*, 157.

ELECTION.

1. *As to ratification of payment.*—When a party has a right to elect whether he will ratify or disaffirm a wrongful payment, he must either ratify or disaffirm it as an entirety: he can not, while suing the original debtor, maintain an action against the person to whom the money was paid, or fasten a trust on the property received by him in payment; though, if the property was merely received as collateral security for the debt, he may pursue it in equity, and at the same time maintain an action at law against the debtor. *Williams, Deacon & Co. v. Jones*, 294.
2. *In criminal case; when compelled.* *Williams v. The State*, 53; *Busby v. The State*, 66.

EMBEZZLEMENT. See CRIMINAL LAW, 14-20.

ENTICING MINOR. See CRIMINAL LAW, 21.

ERROR AND APPEAL.

1. *When appeal lies.*—When the minute-entry, as set out in the record, recites only the verdict of the jury, and the award of an execution thereon, the appeal will be dismissed by the court, *ex mero motu*, because there is no judgment which will support it. *Wagon v. Keenan*, 519.
2. *When returnable.*—When an appeal to this court is taken during term time, it may be made returnable to the first Tuesday in any month during the term (Code, § 3925); but the statute is not mandatory, and if the appeal is not so made returnable, or if it is sued out in vacation, it is returnable, by operation of law, to the next regular term of the court. *Webb v. Robbins*, 176.
3. *Affirmance on certificate; failure to file transcript.*—If the transcript is not filed during the term to which the appeal is taken, the appellee may have an affirmance on certificate; but, if he fails to ask this, and nothing is done with the cause during that term, it passes over to the next term, and a motion to dismiss then comes too late. *Ib.* 176.
4. *Waiver of objections to evidence.*—Objections to evidence, not raised in the court below, will be considered as waived, and will not be noticed by this court on appeal. *Ib.* 176.
5. *Error without injury in admission of evidence.*—The admission of evidence which is at the time *prima facie* inadmissible, is error without injury, when the record shows that its relevancy or admissibility was established by evidence subsequently introduced. *Bedwell v. Bedwell*, 587.
6. *Exception to exclusion of evidence; presumption in favor of judgment.* When objection is made to the answer of a witness to an interrogatory, but not to the interrogatory itself, and the answer is not set out in the record, this court will presume that the answer was legal evidence. *Ib.* 587.
7. *New trial; refusal not revisable.*—The refusal of a new trial is not revisable by this court, on error or appeal. *Ib.* 587.
8. *Revision of judgment on facts.*—The decision of the lower court, overruling and refusing a motion to substitute papers alleged to be

ERROR AND APPEAL—*Continued.*

- lost, will not be disturbed by this court, unless clearly convinced that it is wrong. *Graham v. Hughes*, 590.
9. *Revision of chancellor's decision on evidence.*—The chancellor's decision on a disputed question of fact, as on the question of notice *et non*, will not be disturbed by this court on appeal, unless the record clearly shows that it is wrong. *Sawyers v. Baker*, 461.
 10. *Application for continuance, and admission as to testimony of absent witness; what is revisable.*—Applications for a continuance, or requiring an admission as to the alleged testimony of an absent witness, are addressed to the discretion of the trial court, and its action is not revisable on error or appeal. *De Arman v. The State*, 10.
 11. *Abandonment of special plea.*—When a demurrer to a special plea is overruled, and a demurrer to a replication thereto is sustained, while the bill of exceptions, purporting to set out all the evidence, shows that no evidence was introduced as to the issue thus presented, this court will consider the defense as abandoned, and will not revise the rulings on the demurrer. *Clements v. Railroad Co.*, 533.
 12. *Remandment on reversal, for amendment.*—When the chancellor overrules a demurrer to a bill, and this court, on appeal, reverses his judgment, a final decree will not be here rendered, but the cause will be remanded, in order that the complainant may have an opportunity to amend his bill, if he desires to do so. *Jones v. McPhillips*, 314.
 13. *Plaintiff's right to sue; when and how questioned.*—When the trial was had on the merits, without objection to the plaintiff's right to sue as trustee, his right to maintain the action in that capacity can not be raised for the first time in this court. *Ala. Gold Ins. Co. v. Garner*, 210.

See, also, BILL OF EXCEPTIONS; CHARGE OF COURT.

ESTATES OF DECEDENTS.

1. *Settlement of estate in equity; averments of bill.*—When a bill seeks to compel a final settlement of a decedent's estate, it must aver or show that the estate is ready for a final settlement. *Acklen v. Goodman*, 521.

See, also, EXECUTORS AND ADMINISTRATORS.

ESTOPPEL.

1. *General principle governing.*—In modern times, the doctrine of estoppel has lost the odium once attached to it, and it is now regarded as an important and useful principle, having its origin in moral duty and public policy, intended for the promotion of common honesty and the prevention of fraud; the general principle being, that when a party has procured an advantage to himself, or has induced another person to act to his own prejudice, by the admission or assertion of anything as a fact, he shall not be allowed, in a subsequent suit founded on the same subject-matter, to contradict that admission or assertion. *Caldwell v. Smith*, 157.
2. *Estoppel as between landlord and tenant.*—When a tenant enters into the possession on the faith of his lease, or, being in possession, is permitted to remain on recognition of the landlord's title, he is estopped from setting up an outstanding title in defense of an action by his landlord during the continuance of his estate. *Ib.* 157.
3. *Same; conclusiveness of judgment.*—Where the mortgagor, remain-

ESTOPPEL.—*Continued.*

- ing in possession after a sale under the mortgage, and being sued by a sub-purchaser, denied his tenancy under the plaintiff, and claimed to hold under the original purchaser, and thereby (with other pleas) defeated that action; he can not defeat a subsequent action by the original purchaser, by pleading and proving that he held possession as the tenant of said sub-purchaser. *Ib.*, 157.
4. *Estoppel en pais against creditor by laches, or by accepting fraudulent grantee as indorser.*—A creditor is not estopped from filing a bill to set aside, on the ground of fraud, a conveyance executed by his insolvent debtor, and a subsequent conveyance by the grantee to the debtor's wife, because he delayed for one or two years after the execution of the conveyances, making efforts in the meantime to collect his debt; nor because he renewed his debt after the execution of the conveyances, and accepted the fraudulent grantee as indorser on the renewed note, to the payment of which he seeks to condemn the property conveyed. *Proskauer v. People's Savings Bank*, 257.
 5. *Estoppel against married woman.*—The deed of a married woman, conveying property belonging to her statutory estate, if executed in any other manner than that prescribed by law, or founded on a consideration not sanctioned by law, does not estop her from asserting its invalidity, and asking its cancellation; and though she might be estopped from denying the validity of an act done under a power, and within the scope of her authority as trustee, the precedent inquiry would remain, whether she performed the act in the capacity of trustee. *Harden v. Darwin & Pulley*, 472.
 6. *Estoppel en pais, by representations of debtor as to title of surety, his fraudulent grantee; voluntary and fraudulent conveyances.*—When a debtor, against whom a suit is pending, induces his creditor to dismiss the suit, to extend the time of payment, and to accept the notes of himself and a third person as his surety, on the representation that the surety is the owner in fee of a tract of land, which the debtor himself had bought and paid for, taking the title in the name of the surety for the purpose of defrauding his creditors; as between the parties to the transaction, or their heirs, the facts are to be taken to be as they were represented to be; the creditor having recovered separate judgments on the extended notes, against the debtor and his surety, and seeking, by bill in equity, to subject the land to the satisfaction of the judgment against the surety, which the latter had re-conveyed to his principal, the heirs of the latter are estopped from setting up the fraud under which the surety held the land, or claiming under the re-conveyance to their ancestor; which re-conveyance, if voluntary, is void against the existing creditors of the grantor, and if executed with an intention to defraud the creditors of the grantor, the grantee participating in the fraud, is equally void and inoperative, though full consideration was paid. *Larkin v. Mead*, 485.
 7. *Estoppel between landlord and tenant.*—A tenant can not dispute the title of the landlord under whom he entered, while still holding under him, but must first surrender the possession in good faith; it is not enough that he left the possession for a few days, without notice to his landlord, and again resumed it by collusion with another person. *Littleton v. Clayton*, 571.
 8. *Same.*—Actual prior possession by plaintiff is necessary to the maintenance of an action for unlawful detainer; yet, where the action is brought by a landlord, against his tenant holding over, the defendant is estopped from disputing the fact of such prior possession by plaintiff. *King v. Bolling*, 594.
 9. *Special court.*—When two of the justices of the Supreme Court are disqualified to sit in a cause, the parties may consent, by agree-

ESTOPPEL.—*Continued.*

ment entered of record, that the case shall be submitted to the decision of the remaining justice, and that his decision shall be entered up as the decision of the court; or that two attorneys of the court, named in the agreement, shall be associated with him, and that the decision of the three, or a majority of them, shall be entered up as the judgment of the court; and if one of the attorneys so selected dies before judgment is rendered, the decision of the justice and the surviving attorney, afterwards rendered, and regularly entered up as the judgment of the Supreme Court, is valid and binding on the parties, and can neither be assailed in the court below, to which the cause is remanded by judgment and certificate regular on their face, nor in the Supreme Court after the expiration of the term at which it is regularly entered. *Donnell v. Hamilton*, 610.

EVIDENCE.

ADMISSIBILITY, AND RELEVANCY.

1. *Proof of insolvency.*—Insolvency to-day does not, generally, prove insolvency a week or ten days before; but it is a fact to which the jury may look, in connection with other facts (such as the disparity between the debtor's assets and his liabilities), in determining whether the insolvency did not exist at the former day. *McCormick & Richardson v. Joseph & Anderson*, 236.
2. *Amount of sales made; relevancy to question of compensation.*—In an action to recover damages for a breach of contract, by which defendant, a private corporation engaged in the business of refining cotton-seed oil at Montgomery, Alabama, employed plaintiff as its agent to introduce and establish a market for the sale of its oils in Georgia, and to receive as compensation ten-cent. of the amount of his sales, the amount of sales made by the plaintiff, while engaged in the business of the agency, is competent evidence for him, as tending to furnish a basis for fixing his compensation for the services rendered, but not as affording a guide for estimating future or prospective profits. *Union Refining Co. v. Barton*, 149.
3. *Proof of character.*—As tending to show the character of the deceased as a turbulent and violent man, a witness may be asked if he had not heard that the deceased, a short time before he was killed, had "had several rows and shooting scrapes in another county." *Tesney v. The State*, 33.
4. *Same.*—A witness for the defense having testified to the general character of the deceased as a turbulent, violent, and dangerous man, he may be asked, on cross-examination, "if he had not heard some say that he was a kind and obliging man and a good neighbor;" but not, "if he had not heard men in his neighborhood say he was a kind neighbor;" nor, "if he had not heard some good reports about him;" the second question being too narrow and restricted, and the third too general. *Jackson v. The State*, 18.
5. *Proof of distance between parties when shot was fired.*—For the purpose of showing the distance between the parties when the deceased first fired a pistol at the defendant, as indicated by the marks of powder on the clothes, or the want of such marks, it is not permissible to exhibit to the jury a coat similar to that worn by the defendant at the time, and show the effect of a single experiment in firing at it. *Tesney v. The State*, 33.
6. *Abusive language at time of difficulty.*—As to abusive language used by a person assaulted or beaten, at or near the time of the difficulty, which may be good "in extenuation or justification as the

EVIDENCE—Continued.

- jury may determine" (Code, § 4900), the statute applies only to prosecutions for assault, assault and battery, and affray. *Prior v. The State*, 56.
7. *Proof of former difficulty; admissibility of entire conversation, when part has been received.*—Proof of a previous altercation or difficulty between the defendant and the deceased, a few days before the killing, is admissible evidence against the defendant, though the particulars or merits of that difficulty can not be inquired into; yet, when the prosecution has proved the defendant's subsequent declarations relative to that difficulty, in the nature of threats, and the defendant has proved other parts of his declarations in the same conversation, the prosecution may call for all that was said at the time by the defendant as to the former difficulty. *Martin v. The State*, 1.
8. *Offer to refund.*—Under an indictment for obtaining money under false pretenses (Code, § 4370), evidence of the fact that the defendant offered, two or three weeks after the money was obtained, to refund it with interest, is not relevant or competent evidence for the defense. *Carlisle v. The State*, 71.
9. *Relevancy of evidence as to amount due to defendant by drawer of forged order.*—Under an indictment for forgery in falsely altering and raising an order for merchandise, evidence of the fact that, at the time the order was given, the drawer owed the defendant more than the sum specified in the order, is not relevant or admissible for any purpose. *Bush v. The State*, 83.
10. *Admissibility of justice's proceedings as evidence.*—On a charge of perjury committed by the defendant while testifying as a witness during a preliminary investigation of a criminal charge before a justice of the peace, the original papers of the justice showing the proceedings are competent and admissible as evidence to identify them with the proceedings described in the indictment. *Boynton v. The State*, 29.
11. *Judgment in civil suit; admissibility as evidence in criminal prosecution.*—A judgment recovered against a defaulting tax-collector and his sureties, in a civil action at the suit of the county, is not competent evidence against him in a subsequent criminal prosecution for the default. *Britton v. The State*, 202.

ADMISSIONS; CONFESSIONS, DECLARATIONS; HEARSAY; RES GESTÆ.

12. *Admissions or declarations of agent; when admissible as evidence against principal.*—The admissions and declarations of an agent are not binding on his principal, nor competent evidence against his principal, unless made within the scope of his authority, and while in the discharge of his duties in and about the particular transaction of which they constitute a part of the *res gesta*; and this principle applies equally to the agent of a corporation and of a natural person. *Danner Lumber & Lumber Co. v. Stonewall Ins. Co.*, 184.
13. *Confession, or admission implied from silence.*—The statement of the justice of the peace before whom the preliminary examination of the defendant was had, testifying as a witness on the trial, "that he explained the charge to the defendant, and asked him if he desired to make a statement: that, after defendant made his statement, witness told him his own statement would convict him, and defendant made no reply,"—is not a confession, or admission implied from silence, and is not competent evidence against the defendant. *Wearer v. The State*, 26.
14. *Proof of purchaser's insolvency; subsequent admissions or declarations.*—The insolvency of the purchaser, at the time the contract

EVIDENCE—*Continued.*

- was made, can not be proved by his admissions or declarations made subsequently to a transfer of the goods; and his sworn answer to a bill in chancery, to which the transferee or claimant was not a party, is, as to the latter, *res inter alios*, and not competent evidence. *McCormick & Richardson v. Joseph & Anderson*, 236.
15. *Declarations of defendant, when delivering forged instrument.*—The declarations of the defendant on delivering the order to the person to whom it was addressed, that it was written by McGowen, are admissible as evidence against him, as a part of the *res gestæ* connected with the act of utterance, and as supporting the averment of the indictment that the name signed to the order meant McGowen. *Baysinger v. The State*, 63.
 16. *Former difficulty, as part of res gestæ.*—When it appears that the deceased was killed in a rencounter with the defendant, caused by the latter's interference in another difficulty, immediately preceding it, between the deceased and a third person, whose quarrel the defendant espoused, the two difficulties constituting but one continuous transaction, it is competent for the prosecution to prove the former difficulty, as explanatory of the homicide. *Prior v. The State*, 56.
 17. *Same; admissibility of entire conversation, when part has been received.*—Proof of a previous altercation or difficulty between the defendant and the deceased, a few days before the killing, is admissible evidence against the defendant, though the particulars or merits of that difficulty cannot be inquired into; yet, when the prosecution has proved the defendant's subsequent declarations relative to that difficulty, in the nature of threats, and the defendant has proved other parts of his declarations in the same conversation, the prosecution may call for all that was said at the time by the defendant as to the former difficulty. *Martin v. The State*, 1.
 18. *Declarations of deceased; when admissible as res gestæ.*—The declarations of the deceased, made to his wife, when leaving home on the morning of the killing, that he was going to a specified place, are competent evidence on the principle of *res gestæ*. *Ib.* 1.
 19. *Declarations of defendant; when not admissible.*—The declarations of the defendant, made on the day before the killing, to the effect that he desired to be on friendly terms with the deceased, and would give the witness \$50 if he would effect a reconciliation between them, are not competent evidence for him. *Ib.* 1.
 20. *Defendant's declarations; when admissible as evidence for him in rebuttal.*—Who brought on the difficulty being a controverted question of fact, and the prosecution having adduced evidence tending to show that the defendant went to the place for the purpose of killing the deceased; it is permissible for the defendant to show, in rebuttal, his refusal to go to the place when first asked, the reasons assigned at the time for his refusal, and the circumstances under which he went soon afterwards. *Tesney v. The State*, 33.
 21. *Proof of former marriage.*—In a prosecution for bigamy (Code, § 4185), the fact of a former marriage, valid by the laws of the country in which it was contracted, must be proved by competent evidence, and beyond a reasonable doubt; but it may be proved by the admissions or confessions of the defendant, in the absence of any evidence of statutory regulations on the subject, without the production of a record, or the testimony of a person who was present, the sufficiency of such admissions or confessions being a question for the determination of the jury. *Parker v. The State*, 47.
 22. *"Abstract-book," and "stub-book;" admissibility as evidence.*—The "abstract-book" of property and polls assessed, which the probate judge is required to make and file with the tax-collector

EVIDENCE—*Continued.*

- (Code, § 434), is admissible evidence against the collector, when properly identified; and the "stub-book," required to be kept by the collector himself (Code, § 410), is also competent evidence against him, as an admission of a most solemn character. *Ib.* 202.
23. *Judgment in civil suit; admissibility as evidence in criminal prosecution.*—A judgment recovered against a defaulting tax-collector and his sureties, in a civil action at the suit of the county, is not competent evidence against him in a subsequent criminal prosecution for the default. *Britton v. The State*, 202.
24. *Declaration of party; admissibility as part of res gestæ.*—In an action to recover money alleged to have been deposited by plaintiff's intestate with defendant, for safe-keeping, a witness for plaintiff, who was present at the intestate's house at the time the deposit was alleged to have been made, and who then returned to him, on his request, the bag alleged to contain the money, further testified that he then went into an adjoining room with the defendant, carrying the bag in his hand, and they had a conversation which she did not hear; and that the intestate "soon after came into the room where she was, and told her he had let the defendant have the money to keep." Held, that this declaration, thus standing alone, was not admissible on the principle of *res gestæ*, it not being stated that the intestate returned without the bag. *Tamplin v. Still's Adm'r*, 374.
25. *Entry in memorandum book by deceased person.*—An entry in a memorandum book kept by the plaintiff's intestate, and concerning which a conversation was had between plaintiff and defendant, though competent evidence as explaining the conversation, is not admissible as a memorandum made by the intestate, and can not be proved to be in his handwriting, when it does not appear that the handwriting was mentioned during the conversation. *Ib.* 374.
26. *Transactions with, or statement by decedent; who may testify as to.* On the final settlement of the accounts of a deceased administrator, between his personal representative and the administrator *de bonis non*, an heir or distributee of the intestate's estate, being presumptively interested in the result of the proceeding, is incompetent to testify as to any transaction with, or statement by the deceased administrator, in connection with the assets of the estate (Code, § 3058), unless called to testify by the opposite party. *McDonald v. Jacobs*, 524.
27. *Proof of inventory and report of sale by administrator.*—An inventory or report of sales, made by an administrator, though *prima facie* sufficient to charge him, is not conclusive against him; and the parties in adverse interest, seeking to charge him or his estate, may prove the facts without reference to the inventory or report. *Ib.* 524.

BURDEN, WEIGHT, AND SUFFICIENCY.

28. *Burden of proof, as to exemption.*—A "declaration and claim of exemption," duly made and filed for record in the Probate Court, is *prima facie* correct (Code, § 2831), and imposes on a contesting creditor the *onus* of establishing its incorrectness, or invalidity; and when its validity depends on the time when the debt was contracted, the creditor must affirmatively prove the time for which he contends. *Todd v. McCravey's Adm'r*, 468.
29. *Same; in action against railroad company.*—The liability of a railroad company for damages resulting from a failure to comply with statutory requirements, or from other negligence, whether to persons, or to stock or other property, is the same (Code, §§ 1699, 1700); but, where the injury is to stock or other property, the *onus* of showing a compliance with the statutory requirements is imposed on

EVIDENCE—*Continued.*

- the railroad company, and without this proof it does not relieve itself of the imputation of negligence; but the statute does not extend this rule to actions for personal injuries. *Clements v. Railroad Co.*, 533.
30. *Same; as to notice.*—When the vendor has proved that the goods were obtained from him by the fraud of the purchaser, it is incumbent on the sub-purchaser, claiming protection against the rights of the vendor, to show that he paid value for them; but, when he has done this, the *onus* is on the vendor to prove that he had notice of the fraud. *Spira v. Hornthall & Co.*, 137.
31. *Same; on application for bail or discharge on habeas corpus.*—On an application for a discharge or bail by a person who is in confinement under an indictment for murder, he is presumed to be guilty of murder in the first degree, unless that presumption is overcome by the evidence adduced; and the indictment being produced, the defendant must take the initiative, and rebut the presumption arising therefrom. *Ex parte Rhear*, 92.
32. *Charges as to measure of proof.*—In criminal cases, while absolute or mathematical certainty is not required, to authorize a conviction, the evidence must produce a conviction of the truth of the charge with that degree of certainty on which the mind reposes with satisfaction; and while “reasonable doubt,” and “moral certainty,” as used in this connection, are correct expressions, “it is possible,” or “it may be,” or “perhaps” the defendant is not guilty, as used in charges requested, imply only a possible or imaginary doubt, and the charges are properly refused. *McKleroy v. The State*, 95.
33. *Charges as to reasonable doubt, and probability of innocence.*—A charge asserting that “reasonable doubt, and to a moral certainty, does not mean to an absolute or mathematical certainty, but means an actual and substantial doubt growing up out of the evidence;” and that a “probability of the defendant’s innocence means more than a possibility that he is not or may not be guilty,” is free from error. *Martin v. The State*, 1.

JUDICIAL KNOWLEDGE.

34. *Legislative journals.*—The courts take judicial notice of the journals kept by the two houses of the General Assembly, and are authorized to search them for the purpose of ascertaining whether a particular statute, included in the printed volume published by authority, was enacted in accordance with the forms prescribed by constitutional provision. *Moog v. Randolph*, 597; *Sayre v. Pollard*, 603.
35. *Public lands; and exemption from taxation.*—The court judicially knows that all the lands in this State originally belonged to the United States, and were not subject to taxation until sold. *Bonner v. Phillips*, 427.
36. *Public statute, and election held under it.*—The court will take judicial notice of the act approved March 19th, 1875, known as the “Local Option Law” (Sess. Acts 1874-5, p. 276), and of the counties to which it is applicable; but not of an election held under its provisions in any one of those counties, nor the result. *Grider v. Tally*, 422.
37. *Value of corn.*—That the use of corn as food for horses and mules constitutes value, is a fact which all men are presumed to know; and the court may charge the jury, that they may conclude the corn is valuable, if the proof shows that it was used to feed horses or mules; and circumstantial proof being sufficient, if

EVIDENCE—Continued.

strong and convincing to the satisfaction of the jury, may refuse to instruct them that the fact that the corn had value must "be positively proved by the evidence." *Miller v. The State*, 41.

OBJECTIONS.

38. *General objection*.—A general objection to evidence, some of which is admissible, may be overruled entirely. *King v. The State*, 94.
39. *Specific objection*.—A specific objection to evidence is a waiver of all other grounds of objection. *Littleton v. Clayton*, 571.
40. *Waiver of objections*.—Objections to evidence, not raised in the court below, will be considered as waived, and will not be noticed by this court, on appeal. *Webb v. Robbins*, 176.
41. *Evidence admissible for one purpose only*.—When evidence is offered which is admissible for one purpose only, it can not be excluded from the jury on motion, but a charge should be asked limiting its effect. *Union Refining Co. v. Barton*, 148.
42. *Exception to exclusion of evidence; presumption in favor of judgment*.—When objection is made to the answer of a witness to an interrogatory, but not to the interrogatory itself, and the answer is not set out in the record, this court will presume that the answer was legal evidence. *Bedwell v. Bedwell*, 587.
43. *Error without injury in admission of evidence*.—The admission of evidence which is at the time *prima facie* inadmissible, is error without injury, when the record shows that its relevancy of admissibility was established by evidence subsequently introduced. *Ib.* 587.

OPINION; LEGAL CONCLUSION; EXPERTS.

44. *What witness, testifying negatively as to words used, may state as to his position*.—A witness who was present at the rencounter between the defendants and the deceased, and who testifies that he did not hear the deceased curse or swear as he rode up to the place where the others were, as another witness testified he had done, may further state that he was in such position at the time that, if the words had been used, he could have heard them; being subject to cross-examination as to the particular facts, which would show to what weight his testimony was entitled. *Ib.* 33.
45. *What witness may state*.—A witness who testifies that, while looking for his own cattle, he saw plaintiff's stock near the railroad as he passed, and, on returning an hour and a half afterwards, saw them again just as a train moved off, after stopping, at the place where the cattle were injured, may further state that, if any other train had passed during the intervening time, he could have heard it, and that no other train did pass. *Railroad Co. v. Carloss*, 443.
46. *Proof of foot-prints*.—A witness who measured tracks found at the place where the offense was committed, and compared them with tracks made by the defendant on the next day, may state that they "corresponded;" but he can not be asked whether a particular shoe, which he had seen on defendant's foot, "would have made" such a track as that found at the place. *Busby v. The State*, 66.
47. *Proof of mistake; to what witness may testify*.—A witness who knows that a mistake was made, and by whom made, may state those facts; but, when it is neither proved nor admitted that a mistake was in fact made, a witness can not be allowed to state, "If any mistake was made, it must have been made by me," this being merely the expression of his opinion as to a conclusion of fact to be drawn by the jury. *Insurance Co. v. Garner*, 210.
48. *To what witness may testify*.—The seller of goods, testifying as a witness for himself, in a controversy with a sub-purchaser, can not be

EVIDENCE—*Continued.*

- allowed to state that "he believed the purchaser to be solvent, and would not have sold the goods if he had known of his insolvency." *McCormick & Richardson v. Joseph & Anderson*, 236.
49. *Same; general reputation.*—The seller's ignorance of the purchaser's insolvency is competent evidence for him, on an issue involving his right to reclaim the goods on the ground of fraud, as his knowledge of that fact would be competent evidence against him; yet he can not be allowed to state, while testifying as a witness, that "from general report he understood" that the purchaser was solvent. *Ib.* 236.
50. *Same.*—A witness can not be asked, nor can he be allowed to state, his "reasons for believing" any fact. *McDonald v. Jacobs*, 524.
51. *Experts, as witnesses.*—Whether a witness possesses the necessary qualifications to testify as an expert, is a preliminary question addressed to the court, and much must be left to its discretion; and if the witness be competent as an expert, he may state his opinion, and detail generally the facts on which it is based.—*Tesney v. The State*, 33.

PAROL AND WRITTEN EVIDENCE.

52. *Description of land, in agreement to sell and convey; parol evidence in aid of.*—As held in this case on the former appeal (75 Ala. 475), an agreement to sell and convey a parcel of land, part of a larger tract, described in the written agreement as "sixty acres Comida and cane-bottom, also ten acres hill-side woodland adjoining the Mitchell-tract," is, on its face, void for uncertainty; but parol evidence may be received to aid the uncertain description, and to identify the particular land intended to be sold, which was pointed out at the time, and of which the purchaser was put in possession. *Meyer Bros. v. Mitchell*, 312.
53. *Same; sufficiency of extraneous evidence identifying land sold.*—The particular lands intended to be sold being described in the amended bill with sufficient certainty, and the plat and survey made by the county surveyor, at the instance of the purchaser, corresponding substantially with this description, and its correctness not being impeached by any contradictory evidence; this is sufficient to sustain the chancellor's decree granting a specific performance, although the lands were pointed out to the surveyor by the complainant himself, and the survey was made without notice to the defendants. *Ib.* 312.
54. *Proof of ownership of note.*—In an action by the wife, on a promissory note payable to the husband, and not assigned by him, he may testify that the note belongs to the plaintiff, and not to himself. *Grantham v. Payne*, 584.

PRESUMPTIONS.

55. *Presumption of malice from use of deadly weapon.*—The use of a deadly weapon, from which the law infers malice, casts on the defendant the *onus* of disproving it, unless the presumption is rebutted by the proved circumstances attending the killing; but the presumption may be rebutted by other evidence than that which proves the killing. *Tesney v. The State*, 33; *Williams v. The State*, 53.
56. *On application for bail.*—On an application for a discharge or bail by a person who is in confinement under an indictment for murder, he is presumed to be guilty of murder in the first degree, unless that presumption is overcome by the evidence adduced; and the indictment being produced, the defendant must take the initiative, and rebut the presumption arising therefrom. *Ex parte Rhear*, 22.

EVIDENCE—Continued.

57. *Presumption as to continuance of life, or death from absence for five years.*—When the prosecution has proved that the former wife (or husband) was alive at a specified time before the second marriage, a presumption arises in favor of the continuance of life, and it is then incumbent on the defendant to prove death, or a continuous absence for the period prescribed by the statute (Code, § 4186); and if he left his wife in the State in which they were married, her continued residence there is not *absence* within the meaning of the statute. *Parker v. The State*, 47.
58. *As to presumption arising from failure to adduce evidence, or to call witness.*—No presumption arises, unfavorable to the prosecution in a criminal case, from the failure to examine all the witnesses to the transaction, or every person to whom a dying declaration was made. *Jackson v. The State*, 18.
59. *Presumption arising from lapse of time.*—After the lapse of thirty years (in this case), and uninterrupted possession by the purchaser, the court will make all reasonable presumptions in favor of a due execution of a power of sale, and of the regularity and validity of the conveyance to him, which is not set out, but is described as "sufficient in law to pass the estate and title of the grantors." *Gosson v. Ladd*, 224.

PRIMARY AND SECONDARY EVIDENCE.

60. *Proof of former marriage.*—In a prosecution for bigamy (Code, § 4185), the fact of a former marriage, valid by the laws of the country in which it was contracted, must be proved by competent evidence, and beyond a reasonable doubt; but it may be proved by the admissions or confessions of the defendant, in the absence of any evidence of statutory regulations on the subject, without the production of a record, or the testimony of a person who was present, the sufficiency of such admissions or confessions being a question for the determination of the jury. *Parker v. The State*, 47.
61. *Proof that former wife (or husband) was still living.*—The prosecution must prove, also, that the former wife (or husband) was living at the time the second marriage was contracted; but this may be proved by circumstantial evidence, and positive evidence is not indispensable. *Ib.* 47.
62. *Proof of transfer of cause from County to Circuit Court.*—Where a witness testifies that the prosecution, commenced in the County Court, was there continued several times, and that the prosecution was then transferred to the Circuit Court, a general objection to his evidence is properly overruled, although the docket would be the best evidence of the several continuances. *King v. The State*, 94.
63. *Proof of mortgage, where mortgagor and attesting witnesses sign by mark only.*—When a mortgage of personality is signed by the mortgagor by mark only, and each of the subscribing witnesses signs by mark only, and neither of them is able to identify the paper or any of the marks, the execution of the instrument may be proved by the testimony of the mortgagee himself, or of any other person who saw the maker execute it; and it may be admitted as evidence on such proof, without more. *Jones v. Hough*, 437.
64. *Proof of inventory and report of sale by administrator.*—An inventory or report of sales, made by an administrator, though *prima facie* sufficient to charge him, is not conclusive against him; and the parties in adverse interest, seeking to charge him or his estate, may prove the facts without reference to the inventory or report. *McDonald v. Jacobs*, 524.
65. *Written demand of possession; secondary evidence.*—A previous demand in writing for the surrender of possession being necessary to

EVIDENCE—*Continued.*

- the maintenance of an action for the unlawful detainer of lands (Code, § 3697), secondary evidence of such demand can not be received, until a proper predicate has been laid by notice to produce. *King v. Bolling*, 594; *Littleton v. Clayton*, 571.
66. *Notice to produce paper.*—As to the sufficiency of the notice to produce a paper, the question depends on the attendant circumstances, and the time required to produce the paper; when the paper is in court, and in power of the party to produce immediately, notice at the trial is sufficient; and if he denies in open court that he ever had possession of the paper, or that it was ever delivered to him, he can not object to the sufficiency of the notice to produce; nor can he complain that the court required him to answer whether he had the paper. *Littleton v. Clayton*, 571.

RECORDS AND JUDGMENTS.

67. *Certificate of register of land-office.*—A certificate made by the register of the land-office at Montgomery, which simply states that “the records of said land-office show that, on August 11th, 1855, Sarah Presnall entered at St. Stephens, Alabama,” a tract of land particularly described, is the mere statement of a conclusion by the officer, not a certificate issued under authority of any act of Congress (Code, § 3043), and is not competent evidence for any purpose. *Bonner v. Phillips*, 427.
68. *Judgment in civil suit; admissibility as evidence in criminal prosecution.*—A judgment recovered against a defaulting tax-collector and his sureties, in a civil action at the suit of the county, is not competent evidence against him in a subsequent criminal prosecution for the default. *Britton v. The State*, 202.

VARIANCE.

69. *In prosecution for gaming.*—Under an indictment for betting at a game of cards (Code, § 4209), a conviction can not be had on proof of playing only (§ 4207), the two offenses being separate and distinct. *Chambers v. The State*, 80.
70. *In action against railroad company; variance as to time.*—When the injury is alleged to have occurred on the 21st day of the month, and the evidence shows that it occurred on the first day, the variance is fatal. *Railroad Co. v. Carloss*, 443.
71. As to a variance between the allegations and the proof, in chancery cases, see CHANCERY, 64, 65.

EXECUTION.

1. *Sale by constable; irregularities not rendering void.*—A sale under execution by a special constable, whose appointment was unauthorized (Code, § 768), is not void; and though it is irregular, if made in a precinct and county other than that of the defendant's residence (Code, § 3637), it is not void. *Street v. McClerkin*, 580.
2. *Execution issued by justice of the peace, and sent to another county.* An execution issued by a justice of the peace, and sent to another county to be executed, must be authenticated by the certificate of the probate judge, or of a justice of the peace of the latter county who is acquainted with his handwriting (Code, § 3647); and if not so authenticated, a levy under it is void. *Ib.* 580.
3. *Lien of judgment and execution.*—Under our statutes, a judgment is not a lien on the defendant's property, real or personal, but a lien is created by the issue of an execution and its delivery to the sheriff (Code, § 3210); which lien continues, so long as executions are regularly issued without the lapse of an entire term; but, when

EXECUTION—*Continued.*

the lien has been once lost, by the lapse of an entire term without an execution, it can not be revived, so as to give it continuous force as if there had been no chasm, though a new lien may be acquired by a subsequent execution. *Perkins v. Brierfield Iron & Coal Co.*, 403.

4. *Failure to issue execution for ten years.*—When ten years have elapsed without the issue of an execution, the plaintiff is not entitled to an execution without a revivor of the judgment (Code, §§ 3173-74), though an execution so issued may be voidable only; and the judgment being inoperative and dormant unless revived, the plaintiff stands, in a court of equity, as a creditor by simple contract only. *Ib.* 403.
5. *Purchase at sheriff's sale, by fraudulent grantee.*—A fraudulent grantee of property may become the purchaser at a sale under execution having a paramount lien, and thereby acquire a title which will prevail over subsequent creditors seeking to set aside his conveyance on the ground of fraud, leaving them nothing but the statutory right of redemption.—*Seals v. Pfeiffer & Co.*, 278.
6. *Summary execution on injunction bond.*—When an injunction is sued out by the heirs of the decedent, to enjoin proceedings under an execution issued on a judgment against the administrator, which has been levied on their lands, the injunction bond being payable and conditioned as required by the statute, and duly certified by the register on the dissolution of the injunction (Code, §§ 3870-76); execution may be thereon issued against the obligors, for the amount of the judgment, with interest and damages; and they can not supersede it because the judgment is held void as against the decedent's estate. *McCalley v. Wilburn & Co.*, 549.

EXECUTORS AND ADMINISTRATORS.

1. *Grant of administration; jurisdiction of Probate Court under constitutional provisions.*—In the grant of administrations, the jurisdiction of the Probate Court is derived from constitutional provisions, and is original, general, and unlimited; when exercised, the presumption is indulged, that the court previously ascertained the existence of the necessary jurisdictional facts; and when the record asserts the jurisdictional facts, the presumption is conclusive, though it may be that, when the record is silent, the entire want of jurisdiction can be shown. *Barclift v. Trece*, 528.
2. *Same; under statutory provisions.*—The general grant of jurisdiction over the subject-matter, conferred by constitutional provisions, is distributed among the Probate Courts of the several counties, by statutory provisions designating the special cases in which each may act (Code, § 2349); and when any court, in the exercise of this jurisdiction, erroneously adjudges that any particular case is within its local jurisdiction, the grant of administration is not void, but may be avoided by a direct proceeding for the purpose.
3. *Same; what are "assets" within county.*—A promissory note, or other chose in action, on which a suit is pending when the plaintiff dies, will support a grant of administration on his estate by the Probate Court of some county; and the validity of the grant can not be assailed by the defendant, on the ground of a want of assets in that county. *Ib.* 528.
4. *Foreign grant of administration.*—If the deceased plaintiff was in fact domiciled in another State at the time of his death, and letters of administration are there granted on his estate, the foreign administrator thereby acquires no title to the assets here, nor any right to revive and prosecute the suit, without a compliance with statutory provisions (Code, §§ 2637-40); and any arrangement between him and the distributees, for the collection and distribution

EXECUTORS AND ADMINISTRATORS—*Continued.*

- of the estate, can not bar the further prosecution of the action by the administrator appointed here. *Ib.* 528.
5. *Authority of executor or administrator to bind estate.*—Without express power, an executor or administrator can not, by any act or contract, create a charge or liability against the decedent's estate; nor can he, by any payment, promise or admission, suspend or remove the bar of the statute of limitations, so far as it affects a charge on lands, descended or devised; nor waive, or in any manner displace, the bar of the statute of non-claim. *Grimball v. Mastin*, 553.
 6. *Non-claim as defense; averment of presentment.*—When the bill seeks to enforce against a decedent's estate a claim which is, *prima facie*, within the bar of the statute of non-claim (Code, § 2597), and fails to aver the due presentment of the claim, or facts excepting it from the operation of the statute, it is subject to demurrer; and an averment of an admission by the personal representative, of such presentment, is not the equivalent of an averment of the fact itself. *Ib.* 553.
 7. *Same.*—When the purpose of the bill is to enforce, not the original debt or claim against the decedent's estate, but a subsequent promise by the heirs or devisees, founded on a valid claim against their ancestor, and a lien created by them for its payment or performance, the bar of the statute of non-claim comes collaterally in question, as affecting the consideration of the subsequent promise, and it is not necessary that the bill should aver presentment. *Ib.* 553.
 8. *Admission by executor, as to presentment of claim.*—In the matter of the presentation of claims against the estate, the executor represents the whole estate; and his admissions of due presentment, while he is acting as executor, whether made before or after the expiration of the period allowed for presentment, is evidence of the fact, which is not impaired by his subsequent resignation. *Ib.* 553.
 9. *Promissory note of administrator, for debt of estate; when binding on him personally.*—When an administrator executes a promissory note, under authority granted by an order of the Probate Court (Code, § 2432), for the purpose of settling or extending a debt of the estate, the note imposes no personal liability upon him; but, if the proceedings are substantially defective, and, by reason thereof, the note is not binding on the estate, the general rule applies which governs the contracts of trustees and agents, and the note imposes a personal liability on the administrator. *McCalley v. Wilburn & Co.*, 549.
 10. *Form of judgment against administrator.*—Where the defendant is described, in the summons and complaint, as "W. J. M., administrator of M. A. M.," and in the margin of the judgment-entry as "W. J. M., adm'r of M. A. M.;" while the judgment, by *nil dicit*, is, that the plaintiff "have and recover of the defendant" the amount specified, "to be levied of the goods and chattels of his said intestate in his hands to be administered;" the judgment is against the defendant personally, and the superadded words will be rejected as surplusage, or regarded as a clerical misprision. *Ib.* 549.
 11. *Will construed as conferring personal trusts on executors, which can not be exercised by one only.*—Where the testator devised his entire estate, real and personal, to his two executors as trustees, authorizing them to continue his mercantile business, at their discretion, for the benefit of his estate, with power to sell, buy, or re-invest, and to manage the business "upon their judgments, without any order of court," but after consultation with his widow; the income

EXECUTORS AND ADMINISTRATORS—*Continued.*

and profits, after payment of his debts, to be used for the support and maintenance of his widow and child or children as a family during her life, and on her death the property to vest absolutely in the children; *held*, that the will created personal trusts, which could not be executed by the sole executor who qualified. *Werborn v. Austin*, 381.

12. *Executor and trustee acting without authority; bill for account and settlement.*—When a sole acting executor undertakes the management of the estate, and the execution of the personal trusts created and conferred by the will on both of the persons named as executors, although he acts without authority, he renders himself liable as a trustee; and he may be required to account in equity at the suit of the remainder-man. *Ib.* 381.

EXEMPTIONS.

1. *Waiver.*—A waiver of all exemptions, contained in a promissory note, though inoperative as to the homestead (Code, § 2848), is valid and effectual as to personal property. *Wagon v. Kewan*, 519.
2. *Same.*—A verbal mortgage of personal property can not operate as a valid waiver of the right to claim the property as exempt (Code, §§ 2846, 2848); and a written instrument is not effectual for that purpose, unless the intention to make such waiver is therein clearly expressed. *Knox v. Wilson*, 309.
3. *By what law determined, and value in 1867.*—As against the claims of creditors, the extent and amount of exemptions are to be determined by the law which was of force when their debts were created; and under the laws which were of force prior to the 19th February, 1867, a debt of money in the hands of a garnishee could not be claimed as exempt. *Todd v. McCrory's Adm'r*, 468.
4. *Claim of exemption against garnishment; where filed.*—When a garnishment is levied upon any personal property other than money or *choses in action*, a claim of exemption thereto "must be lodged with the officer making the levy" (Code, § 2834); but, when the levy is upon "any money or *choses in action*" (*Ib.* § 2842), the claim of exemption must be filed, verified by affidavit, in the court where the proceeding is pending; and it may be interposed at any time before the debt is condemned in the hands of the garnishee, but subject to reasonable regulation by the court. *Ib.* 468.
5. *Burden of proof, as to exemption.*—A "declaration and claim of exemption," duly made and filed for record in the Probate Court, is *prima facie* correct (Code, § 2831), and imposes on a contesting creditor the *onus* of establishing its incorrectness, or invalidity; and when its validity depends on the time when the debt was contracted, the creditor must affirmatively prove the time for which he contends. *Ib.* 468.

FORCIBLE ENTRY, AND UNLAWFUL DETAINER.

1. *Complaint.*—A count for forcible entry and detainer, and a count for unlawful detainer, may be united in the same complaint; and if the original complaint, filed in the justice's court, was for forcible entry and detainer, a complaint for unlawful detainer may be filed in the Circuit Court. *Littleton v. Clayton*, 571.
2. *Demand of possession, and proof thereof.*—To maintain an action of unlawful detainer, a written demand of possession is indispensable (Code, § 3697); and parol evidence of such demand can not be received, until a proper predicate has been laid by notice and failure to produce it. *Ib.* 571; also, *King v. Bolling*, 594.
3. *Proof of prior possession; estoppel between landlord and tenant.*

FORCIBLE ENTRY, AND UNLAWFUL DETAINER—*Continued.*

Actual prior possession by plaintiff is necessary to the maintenance of an action for unlawful detainer; yet, where the action is brought by a landlord, against his tenant holding over, the defendant is estopped from disputing the fact of such prior possession by plaintiff. *Ib.* 571, 594.

4. *Three years possession, as bar to action.*—The uninterrupted occupation of the premises by defendant for three years before the commencement of the action, his estate not being determined, is a bar to the action (Code, § 3705); but a tenant holding over can not set up such three years possession as a bar, when he has paid, or promised to pay rent, during that period. *Ib.* 594.

FORGERY. See CRIMINAL LAW, 32-36.

FORMER CONVICTION, OR ACQUITTAL. See CRIMINAL LAW, 77-80.

FRAUD.

1. *Fraudulent representation; matters of opinion, or matters equally open to both parties.*—The mere expression of an opinion can not be a fraudulent representation, unless falsely made, with intent to deceive, and actually deceiving; nor can it constitute a fraud, vitiating a contract thereby procured, when it relates to a matter equally open to both parties. *Railroad Co. v. Matthews*, 357.
2. *Subscription for stock in railroad company, procured by fraud of agent.*—A subscription to the stock of an incorporated railroad company, procured by the fraud of the company's agent soliciting subscriptions, may be defeated on the plea of fraud, when the company attempts to enforce it by suit. *Ib.* 357.
3. *Fraudulent representations to other persons.*—There are cases of fraud, and other unlawful acts, particularly acts of the same general character continuous in their nature, where it is permissible to prove other similar transactions occurring at or about the same time, as shedding some light on the particular transaction in controversy; but, in an action against a subscriber for stock in a railroad company, who defends on the ground of fraudulent representations by the company's agent in procuring his subscription, he can not be allowed to prove similar representations made by said agent to other subscribers in the same neighborhood. *Ib.* 357.
4. *False representation constituting failure of consideration.*—A statement as of fact by the vendor of an article, on which the purchaser has a right to rely, and on which he does rely, purchasing on the faith of it, constitutes, if false, a good defense to an action for the purchase-money, though not known by the seller to be false; and this, not on the ground of fraud, but of failure of consideration; but this principle does not apply to a statement which is merely the expression of an opinion. *Ib.* 357.
5. *False representations by agent, as to location and completion of road.* Representations by the agent of a railroad corporation, soliciting subscriptions for stock from persons living along the contemplated route of the road, as to its intended location, and the time within which it will be completed to a particular place, are but the mere expression of an opinion, and neither constitute a fraud, nor are available as a defense to an action on a subscription for stock made on the faith of them, unless known by the agent to be false, and made by him with intent to deceive. *Ib.* 357.
6. *Fraud by purchaser, in buying goods; rights of seller.*—Where goods are obtained on credit by an insolvent purchaser, with no intention or reasonable expectation of paying for them, and without disclosing to the seller his financial status, the fraud vitiates the sale, and the seller may recover the goods, except from a sub-pur-

FRAUD—*Continued.*

chaser for valuable consideration without notice. *McCormick & Richardson v. Joseph & Anderson*, 236; *Spira v. Hornthall et al.*, 137.

7. *Same; sub-purchase for value, without notice; innocent sufferers by wrongful act of third person.*—If the goods have passed into the hands of a sub-purchaser for valuable consideration, without notice of the fraud, his right is superior to that of the original vendor, and the latter can not recover the goods from him; the principle applying as between them, that where one of two innocent persons must suffer by the wrongful act of a third person, the loss must fall on him who put it in the power of that person to perpetrate the wrong; and a remote sub-purchaser is equally entitled to protection against the claim of the vendor, when either he or any one of the intermediate purchasers acquired the goods for valuable consideration without notice. *Ib.* 137.
8. *Same; who is purchaser for value.*—Merely agreeing to take the goods in payment of an indebtedness past-due, and entering a credit on the account for the price, without surrendering anything valuable, does not entitle the creditor to protection as a purchaser for valuable consideration; *scens.* if he takes them in absolute payment and satisfaction, and surrenders the evidence or securities of his debt. *Ib.* 137.
9. *Same; burden of proof as to notice.*—When the vendor has proved that the goods were obtained from him by the fraud of the purchaser, it is incumbent on the sub-purchaser, claiming protection against the rights of the vendor, to show that he paid value for them; but, when he has done this, the *onus* is on the vendor to prove that he had notice of the fraud. *Ib.* 137.
10. *Proof of purchaser's insolvency; subsequent admissions or declarations.*—The insolvency of the purchaser, at the time the contract was made, can not be proved by his admissions or declarations made subsequently to a transfer of the goods; and his sworn answer to a bill in chancery, to which the transferee or claimant was not a party, is, as to the latter, *res inter alios*, and not competent evidence. *McCormick & Richardson v. Joseph & Anderson*, 236.
11. *To what witness may testify.*—The seller of goods, testifying as a witness for himself, in a controversy with a sub-purchaser, can not be allowed to state that "he believed the purchaser to be solvent, and would not have sold the goods if he had known of his insolvency." *Ib.* 236.
12. *Same; general reputation.*—The seller's ignorance of the purchaser's insolvency is competent evidence for him, on an issue involving his right to reclaim the goods on the ground of fraud, as his knowledge of that fact would be competent evidence against him; yet he can not be allowed to state, while testifying as a witness, that "from general report he understood" that the purchaser was solvent. *Ib.* 236.
13. *Fraud as ground of equitable relief.*—Fraud is not, of itself, a ground for equitable interference, where the complainant has a legal title, and a full and adequate remedy at law; and the fact that her name was forged—was signed without her authority, knowledge or consent—as grantor with her husband, to a conveyance of lands belonging to her statutory estate, of which the defendant is in possession, claiming under the forged deed, is no obstacle to a recovery at law, and, therefore, no special ground for equitable interference. (SOMERVILLE, J., dissenting.) *Peoples v. Burns*, 290.
14. *Fraud vel non; charge invading province of jury.*—Where the plaintiff claims the money in controversy under a deed of gift from her husband, which is assailed on the ground of fraud in fact, the issue of fraud *vel non* is a question for the jury, and a general charge in

FRAUD—*Continued.*

favor of the defendant is an invasion of their province. *Seals v. Holloway's Adm'r*, 344.

FRAUDS, STATUTE OF.

1. *Verbal lease for one year, commencing at future day.*—Although a verbal lease for the term of one year, to commence at a future day, is void under the statute of frauds (Code, § 2121); yet, if the tenant takes possession under the lease, and pays the rent as stipulated, this imparts validity to the contract, creates the relation of landlord and tenant between the parties, and gives the landlord a right to an attachment against the crop for advances made during the year. *Martin v. Blanchett*, 288.
2. *Pleading statute.*—The statute of frauds as a defense, if not specially pleaded, is waived, and is not available under the general issue. *Ib.* 288.

FRAUDULENT CONVEYANCES.

1. *When absolute conveyance will be declared mortgage, and therefore fraudulent as against creditors.*—A conveyance which, though absolute on its face, was intended to operate only as a mortgage, or security for a debt, is fraudulent and void as against the creditors of the grantor; but it will not be so declared at their instance, unless the evidence is clear and convincing, since the law never strives to force conclusions of fraud. *Danner Land & Lumber Co. v. Stonewall Ins. Co.*, 184.
2. *Absolute conveyance, with subsequent agreement for re-purchase; retention of possession by vendor, as badge of fraud; agreement not to record deed.*—A conveyance which is absolute on its face will not be declared a mortgage, and therefore fraudulent as against creditors, because it is shown that, a few days after the consummation of the transaction, the parties entered into a new contract in writing, by which the purchaser gave the vendor a right to re-purchase the property at the same price; nor will the transaction be held fraudulent, because the vendor remained in possession after the sale, when it is shown that this was under an agreement to pay rent; nor because the grantee agreed to withhold the deed from record, for fear of injuring the credit of the grantor, but nevertheless did record it by advice of his attorney. *Ib.* 184.
3. *Fraudulent conveyance; simulated consideration.*—When the consideration of a conveyance by a debtor is wholly simulated, or is partly simulated for the purpose of approximating the apparent consideration and the real value of the property conveyed, and the conveyance is executed with the intent to prevent the property from being subjected to the debts of the grantor, it is fraudulent and void as against creditors. *Proskauer v. Savings Bank*, 257.
4. *Same; antecedent liability as surety on administration bond, as consideration.*—An absolute conveyance by an insolvent or embarrassed debtor to his surety on an administration bond, intended only as a security or indemnity against the surety's antecedent liability, no new or additional liability being contemporaneously incurred, is fraudulent and void against the existing creditors of the grantor. *Ib.* 257.
5. *Estoppel en pais against creditor by laches, or by accepting fraudulent grantee as indorser.*—A creditor is not estopped from filing a bill to set aside, on the ground of fraud, a conveyance executed by his insolvent debtor, and a subsequent conveyance by the grantee to the debtor's wife, because he delayed for one or two years after the execution of the conveyances, making efforts in the meantime to collect his debt; nor because he renewed his debt after the execu-

FRAUDULENT CONVEYANCES—*Continued.*

tion of the conveyances, and accepted the fraudulent grantee as indorser on the renewed note, to the payment of which he seeks to condemn the property conveyed. *Proskauer v. People's Savings Bank*, 257.

6. *Statute of limitations in favor of fraudulent grantee.*—The limitation in favor of a fraudulent grantee of land, against creditors of his grantor, is ten years; and in cases of fraud, the creditor is allowed an additional period of one year after the discovery of the fraud (Code, § 3242); but this is not an exception restricting the general limitation to one year. *Ib.* 257.
7. *Estoppel en pais, by representations of debtor as to title of surety, his fraudulent grantee; voluntary and fraudulent conveyances.*—When a debtor, against whom a suit is pending, induces his creditor to dismiss the suit, to extend the time of payment, and to accept the notes of himself and a third person as his surety, on the representation that the surety is the owner in fee of a tract of land, which the debtor himself had bought and paid for, taking the title in the name of the surety for the purpose of defrauding his creditors; as between the parties to the transaction, or their heirs, the facts are to be taken to be as they were represented to be; the creditor having recovered separate judgments on the extended notes, against the debtor and his surety, and seeking, by bill in equity, to subject the land to the satisfaction of the judgment against the surety, which the latter had re-conveyed to his principal, the heirs of the latter are estopped from setting up the fraud under which the surety held the land, or claiming under the re-conveyance to their ancestor; which re-conveyance, if voluntary, is void against the existing creditors of the grantor, and if executed with an intention to defraud the creditors of the grantor, the grantee participating in the fraud, is equally void and inoperative, though full consideration was paid. *Larkin v. Mead*, 485.
8. *Conveyance by husband to wife; validity as against creditors.*—The conveyance by a husband to his wife, here assailed by subsequent creditors on the ground of fraud, was held fraudulent and void, on substantially the same facts, in the case of *Seals v. Robinson & Co.*, at the last term (which see, in 75 Ala. 363); and the court adheres to the conclusion then announced. *Seals v. Phrigger & Co.*, 273.
9. *Same; proof of consideration as against creditor; hearing on bill and answer.*—As against creditors of the husband existing at the time of the execution of a conveyance by him to his wife, the *onus* is on her to show the payment of a valuable consideration; but an indebtedness on his part, for moneys belonging to her statutory estate, by him received and converted, or appropriated to his own uses, is a valuable consideration; and where such consideration is set up in an answer under oath to a bill for discovery, and in response to special interrogatories attached to the bill, and the hearing is on bill and answer only, the complainant is not entitled to a decree subjecting the lands to the satisfaction of his debt. *Floyd v. Floyd*, 353.
10. *Validity of mortgage, as against prior judgment.*—As against a judgment, which is evidence of an indebtedness from the date of its rendition, a mortgage subsequently executed by the debtor, in the absence of proof of its consideration, must be adjudged voluntary, and constructively fraudulent; but, as between the parties, the mortgage is valid, and confers on the mortgagee a title on which he may maintain an action against any one who does not connect himself with the judgment. *Street v. McClerkin*, 580.

GAMING. See CRIMINAL LAW, 37,

GARNISHMENT. See ATTACHMENT.

GRAND JURY. See CRIMINAL LAW, 66.

GUARDIAN AND WARD.

1. *Jurisdiction of equity to compel settlement.*—The Chancery Court has original jurisdiction over the settlement of a guardian's accounts, and the ward may invoke its jurisdiction, at any time before proceedings have been commenced in the Probate Court, without assigning any special reasons. *Fulgham v. Herstein*, 496.
2. *Parties to bill for settlement, when guardian is dead, and his estate insolvent.*—In the absence of statutory provisions, the death of the guardian, and the insolvency of his estate, furnish a sufficient reason for the omission to make his personal representative a party to a bill filed by the ward against the surety on his official bond, or the personal representative of the deceased surety, to compel an account and settlement; and the statute now authorizing a suit against one or more of several joint obligors without joining the others (Code, § 3754), such a bill may be maintained without alleging the insolvency of the estate of the deceased guardian. *Ib.* 496.

HABEAS CORPUS.

1. *Application for bail or discharge; burden of proof.*—On an application for a discharge or bail by a person who is in confinement under an indictment for murder, he is presumed to be guilty of murder in the first degree, unless that presumption is overcome by the evidence adduced; and the indictment being produced, the defendant must take the initiative, and rebut the presumption arising therefrom. *Ex parte Rhear*, 92.

HOMICIDE. See CRIMINAL LAW, 38-60.

HUSBAND AND WIFE.

1. *Contracts between husband and wife, at common law.*—At common law, all contracts between husband and wife were prohibited, and a conveyance of property by the wife to the husband directly was void; but a married woman was not incapacitated to act as trustee, express or implied, and she might, in the exercise of a power as trustee, make a conveyance to her husband, which a court of equity would sustain as if made to a third person. *Harden v. Darwin & Pulley*, 472.
2. *Same, under statutory provisions.*—The capacity of the wife to make contracts is not enlarged by the statutory provisions creating and regulating the estates of married women, and contracts between her and her husband for the sale of property are prohibited (Code, § 2709); yet she may, as at common law, execute a power as trustee in his favor, or be declared a trustee *in invitum* at his instance. *Ib.* 472.
3. *Estoppel against married woman.*—The deed of a married woman, conveying property belonging to her statutory estate, if executed in any other manner than that prescribed by law, or founded on a consideration not sanctioned by law, does not estop her from asserting its invalidity, and asking its cancellation; and though she might be estopped from denying the validity of an act done under a power, and within the scope of her authority as trustee, the precedent inquiry would remain, whether she performed the act in the capacity of trustee. *Ib.* 472.
4. *Purchase of lands with joint moneys of husband and wife; resulting trust, and voluntary partition.*—When lands are purchased and paid for, partly with the moneys of the husband, and partly with moneys belonging to the statutory estate of the wife, the title

HUSBAND AND WIFE—*Continued.*

being taken in her name, a resulting trust may be established in favor of the husband, to the extent of his moneys so invested, by proof repelling the presumption of an advancement or provision for the wife; and if the parties voluntarily execute a deed of partition, reciting the facts, a court of equity will sustain and enforce it against the wife or her heirs, "so far as the partition clearly appears to be fair and just;" but, if two separate tracts of land are so bought, at different times, and by distinct contracts, and by the deed of partition one tract is assigned to each, thereby effecting a partial exchange, a court of equity will not enforce it against the wife or her heirs, though it might be sustained "when shown to be equitable and for the benefit of the wife." *Ib.* 472.

5. *Same; recitals of deed.*—The recitals of the deed of partition in such case, if made deliberately and freely, are entitled to great weight, but are not conclusive; and when it is shown, as here, that they are untrue in fact, that the partition was not equitable, fair and just, and that it was procured by undue influence and other improper means while the wife was an invalid, a court of equity will cancel and set it aside, at the instance of her heirs, although it is not shown that the entire purchase-money was paid by the wife. *Ib.* 472.
6. *Purchase of lands by husband, with wife's money; approval by court of voluntary act which it would have compelled.*—When lands are bought by the husband with moneys belonging to the separate estate of his wife, whether statutory or equitable, and the title taken in his own name, a court of equity will, at the instance of the wife, compel him to convey the property to her, by words creating the same estate as that by which she held the money, unless creditors or purchasers have acquired intervening rights; and if the husband does this voluntarily, the court will sanction and approve the act. *Lee v. Lee*, 412.
7. *Same.*—Although the wife can not repudiate an investment of her moneys by her husband, with her consent, in the purchase of lands for her, and recover the money invested; yet, where the husband purchases lands in his own name, and for his own benefit, using funds belonging to the separate estate of his wife, with her consent, in paying the purchase-money, the same principle applies as in case of any other purchase by a trustee with trust funds; she may charge the husband personally, or trace the money and claim the lands, or charge them with the re-payment of her money used in their purchase; and she may assert this equity against all persons except a purchaser for value without notice. *Sawyers v. Baker*, 461.
8. *Same; conflicting equities of wife, and sureties and mortgagees of vendor.*—When an administrator sells land under a probate decree, becoming himself the purchaser, giving his note with sureties for the purchase-money, and executing to them, after the maturity of the note, but before he had obtained a conveyance under the order of the court, a mortgage on the lands for their indemnity; if he resells a portion of the lands to the husband of one of the distributees, who, with his consent, and with the knowledge of his sureties on the note, uses the wife's distributive share in part payment to the succeeding administrator; the sureties, having afterwards paid the balance due on the note, can not assert, as against the equity of the wife arising out of such use of her moneys, a superior right by subrogation, nor under the mortgage. *Ib.* 461.
9. *Conversion of wife's equitable estate into statutory estate.*—Conceding that a married woman, owning an equitable estate, may intentionally convert it into a statutory estate; yet such conversion, intentionally made, is not shown by proof of the facts, that lands bought

HUSBAND AND WIFE—*Continued.*

- by the husband with moneys belonging to her equitable estate, title being taken in his own name, and afterwards sold under execution against him, were bought in her name, with other moneys belonging to her equitable estate, and conveyed to her by words not excluding his marital rights; nor by a decree in chancery, under a bill filed by her against subsequent purchasers at execution sale against her husband, by which the title is vested in her "as her separate estate under the laws of this State." *Lee v. Lee*, 412.
10. *Decree declaring lands to belong to married woman*, "as her separate estate under the laws of this State;" whether estate is statutory or equitable.—Under a decree in a chancery cause, rendered in 1875 (before the decision in *Short v. Battle*, 52 Ala. 456, re-established the distinction between the statutory and equitable estates of married women), enjoining actions at law by purchasers at execution sale against the husband, and vesting the title to the lands in controversy in the wife, who was the complainant, "as her separate estate under the laws of this State;" these words "are of doubtful import on their face," and the court does not decide whether they create a statutory or an equitable estate; but they do not establish an intended change in the character of the complainant's estate, as shown by the pleadings and proof. *Ib.* 412.
 11. *Conveyance of lands to married woman; character of estate*.—A conveyance of lands to a married woman, without any words showing an intention to exclude her husband's marital rights, vests in her a statutory estate. *Ib.* 412.
 12. *Same*.—A conveyance of lands to a married woman, "to her only proper use and behoof," excludes the marital rights of her husband, and creates in her an equitable estate, as distinguished from a statutory estate. *Webb v. Robbins*, 176.
 13. *Conveyance by husband to wife; validity as against creditors*.—The conveyance by a husband to his wife, here assailed by subsequent creditors on the ground of fraud, was held fraudulent and void, on substantially the same facts, in the case of *Seals v. Robinson & Co.*, at the last term (which see, in 75 Ala. 363); and the court adheres to the conclusion then announced. *Seals v. Pfeiffer & Co.*, 278.
 14. *Same; proof of consideration as against creditor; hearing on bill and answer*.—As against creditors of the husband existing at the time of the execution of a conveyance by him to his wife, the *onus* is on her to show the payment of a valuable consideration; but an indebtedness on his part, for moneys belonging to her statutory estate, by him received and converted, or appropriated to his own uses, is a valuable consideration; and where such consideration is set up in an answer under oath to a bill for discovery, and in response to special interrogatories attached to the bill, and the hearing is on bill and answer only, the complainant is not entitled to a decree subjecting the lands to the satisfaction of his debt. *Floyd v. Floyd*, 353.
 15. *Cancellation of conveyance by husband and wife; ignorance of contents*.—A conveyance of the wife's property, duly executed by her and her husband, will not be cancelled and set aside, at her instance, on averment "that she was induced and persuaded by her said husband to sign said deed, without knowing the purport and effect thereof." *Tomlinson v. Watkins*, 399.
 16. *Wife's statutory estate; for what articles liable*.—The wife's statutory estate can not be subjected by action (Code, § 2711) to liability for articles of apparel purchased by the husband for his own individual use. *Grantham v. Payne*, 584.
 17. *When wife may sue on note, payable to husband*.—A promissory note, given for the purchase-money of lands belonging to the statutory estate of the wife, though taken payable to the husband, is a part

HUSBAND AND WIFE—*Continued.*

of the *corpus* of her estate; and she may maintain an action on it in her own name, without any assignment or transfer by her husband. *Ib.* 584.

18. *Interest and hires; when wife can not recover.*—The husband being entitled, so long as he remains trustee of his wife's statutory estate, to receive the income of her property, and having power transfer it; when the wife sues to recover her property which has been sold by him, she can not recover hire; and when she seeks, by bill in equity, to charge lands with the payment of her moneys used by him in its purchase, she is not entitled to interest. *Sawyers v. Baker*, 461.
19. *Husband and wife as parties.*—The 15th Rule of Chancery Practice, requiring bills by married women, in reference to their separate estates, to be filed in their names alone, without joining their husbands, fell with the statute on which it was founded, and which was abrogated by its omission from the Code of 1876; and since its abrogation, the husband must be joined with his wife as a complainant in a suit relating to her statutory estate. *Werborn v. Austin*, 381.
20. *Wife as party to bill filed by her trustee; amendment as to parties.* The wife is a proper party to a bill filed by her testamentary trustee, which seeks to set aside and cancel a mortgage of her property executed by her and her husband to secure a recited indebtedness; and if she is joined as a defendant with her husband and the mortgagee, her name may be struck out by amendment, and she may then be made a co-complainant with the trustee. *Tatum Brothers v. Walker*, 563.

INDICTMENT. See CRIMINAL LAW, 61-65.

INSOLVENT ESTATES.

1. *Pending suit, as claim against insolvent estate; time of filing, and objection to.*—The mere pendency of an action against the administrator, at the time an estate is declared insolvent, does not take away the jurisdiction of the Probate Court to adjudicate the claim, nor extend the time for filing objections to it. The plaintiff may, notwithstanding the suggestion of insolvency, proceed to trial on the other issues, and have his judgment certified to the Probate Court; but he is not required to do so, and may at once file his claim in the Probate Court, afterwards dismissing his suit; and no objections being filed within the period allowed by the statute (Code, § 2375), the claim must be allowed. *Cunningham v. Lindsay*, 510.
2. *Insolvency of defendant's estate, before judgment against garnishee.* On the death of the defendant pending the suit, the action being revived against his administrator, who afterwards reports the estate insolvent, and suggests to the court that it has been reported and declared insolvent, no valid judgment can afterwards be rendered against the garnishee. *Seals v. Holloway's Adm'r*, 344.

INSURANCE.

1. *Verbal agreement to insure; when risk begins.*—A verbal agreement, made in October, to issue a policy of insurance for twelve months in the early part of November, covers a loss occurring on the 19th day of November. *Home Insurance Co. v. Adler*, 242.
2. *Same; when complete, and sufficient to support action for breach.*—A valid agreement to insure a stock of goods against loss by fire may be made verbally, and an action maintained for the breach thereof, on proof that the substantial provisions of the policy were agreed

INSURANCE—*Continued.*

- on between the plaintiff and the defendant's authorized agent, prepayment of the premium being waived, and some of the details left to the judgment of the agent in filling out the policy; that the parties separated under the mutual supposition that the contract was complete, and that a policy was afterwards issued, but subsequent to the loss of the goods, in which the details were filled out according to the understanding of the terms by the agent. *Ib.* 242.
3. *Policy of life-insurance; when representations are warranties; statements as to age of applicant.*—Although warranties are never favored, and will neither be created nor extended by construction; yet, when declared in express terms in a policy of insurance, the conditions and stipulations must be strictly complied with, without regard to the otherwise immaterial character of the matter to which they relate; and a representation as to the age of the applicant for a policy of life-insurance, being the basis on which the amount of the premium is computed, is necessarily material. *Ala. Gold Life Ins. Co. v. Garner*, 210.
 4. *Same; statements in application, when made by applicant, or by agent of insurance company.*—When the answers to the questions contained in the printed form of application are written by the agent of the insurer, from his own knowledge or judgment, or from information obtained from third persons, and are untrue, or are incorrectly written down by him from answers truthfully made by the applicant, the insurance company can not take advantage of their falsity or incorrectness, although the policy is based on their truth, and declares them to be warranties; but, when they are correctly written by the agent from the verbal answers of the applicant, and are afterwards read over to him, and then signed by him, they are his answers and statements, though copied by the agent from memoranda taken by him at the time the verbal answers were made. *Ib.* 210.
 5. *Same; mistakes in answers to questions in application.*—The insurance company can not take advantage of a mistake in the application, when committed by its own agent; nor can the beneficiaries, suing on the policy, claim that a false statement was made by the assured through mistake, inadvertence, or ignorance, when the statement is declared to be a warranty. *Ib.* 210.
 6. *Assignment of policy; when assignee may sue in his own name.* When a policy of insurance is assigned pursuant to its terms, the assignee may maintain an action on it in his own name, in the event of a loss (Code, § 2890); but, where a policy is taken out by the mortgagor in his own name, the addition of the words, "Loss, if any, payable to J. F., to the extent of his mortgage interest," is a mere appointment of a part of the money, and does not constitute an assignment; nor does it authorize said J. F. to maintain an action on the policy in his own name, though the partial loss does not exceed the amount due on his mortgage. *Fire Insurance Companies v. Felrath*, 194.
 7. *Stipulations in policy as to proof of loss, examination of assured, &c.; when conditions to right of recovery.*—There is no rule of law, or of public policy, which forbids parties, when entering into contracts of insurance, from stipulating that, in case of loss, the preliminary proofs thereof shall be furnished by the assured himself; that he shall submit himself to be examined on oath, and shall procure the certificate of a magistrate as to certain designated facts; and when these stipulations are made in the policy, a compliance with them is a necessary condition to a right of recovery, unless performance has been waived by the insurer. *Ib.* 194.
 8. *Waiver of defects or irregularities in proofs of loss.*—When notice and preliminary proof of loss are served within a reasonable time, the

INSURANCE—*Continued*.

insurer must answer within a reasonable time afterwards; and if he fails to do so, or refuses to pay without objection to the sufficiency of the proof, this is a waiver of any and all objection to its sufficiency; and if he points out certain alleged defects or irregularities in the proof, this operates as a waiver of all other defects or objections, however obvious or glaring. *Ib.* 194.

9. *Same; reasonable time, as question of fact; general charge on evidence.*—What is a reasonable time, in such case, being a mixed question of law and fact, largely dependent on the particular facts of each case, must always be submitted to the jury, under appropriate instructions; and when the testimony is not clear, and free from conflict on material points, a general charge in favor of either party is an invasion of the province of the jury. *Ib.* 194.

INTEREST. See HUSBAND AND WIFE, 18.

JUDGMENTS, AND DECREES.

1. *Judgment by nil dicit; conclusiveness of.*—A judgment by *nil dicit*, in an action on a promissory note, is conclusive as to all personal defenses which might have been urged against it, and precludes the defendant from denying that he owes plaintiff the amount thereby adjudged. *McCalley v. Wilburn & Co.*, 549.
2. *Form of judgment against administrator.*—Where the defendant is described, in the summons and complaint, as "W. J. M., administrator of M. A. M.," and in the margin of the judgment-entry as "W. J. M., adm'r of M. A. M.;" while the judgment, by *nil dicit*, is, that the plaintiff "have and recover of the defendant" the amount specified, "to be levied of the goods and chattels of his said intestate in his hands to be administered;" the judgment is against the defendant personally, and the superadded words will be rejected as surplusage, or regarded as a clerical mispision. *Ib.* 549.
3. *Judgment against garnisher, and against claimant of fund.*—When a garnishment is sued out in aid of a pending action (Code, § 3219), and a claimant of the fund in the hands of the garnishee, being summoned, propounds his right and interest; the issue being tried before judgment has been rendered in the original suit, a judgment for costs may be rendered against the claimant, and his claim be declared invalid; but it is irregular to render judgment final against the garnishee, in favor of the plaintiff, with an award of execution. *Seals v. Holloway's Adm'r*, 344.
4. *Sale of lands by assignee, under order of court; rights of persons not parties.*—A sale of land by an assignee in bankruptcy, under an order of court, can not affect the rights of third persons, who are not made parties, and who have no notice, although their rights would have been concluded if they had been brought in. *Cain v. Sheets*, 492.
5. *Same; heirs and administrator as parties.*—Where the bankrupt surrendered a tract of land which he had bought, not having paid the purchase-money, and having only received a bond for title; a sale of the land by the assignee, under an order of the court, does not affect the title of the heirs of the deceased vendor, who were not made parties, although the administrator was brought in. *Ib.* 492.
6. *Conclusiveness of judgment.*—Where the mortgagor, remaining in possession after a sale under the mortgage, and being sued by a sub-purchaser, denied his tenancy under the plaintiff, and claimed to hold under the original purchaser, and thereby (with other pleas) defeated that action; he can not defeat a subsequent action by the original purchaser, by pleading and proving that he

JUDGMENTS AND DECREES—*Continued.*

- held possession as the tenant of said sub-purchaser. *Caldwell v. Smith*, 157.
7. *Supreme Court; conclusiveness of decision on lower court.*—A decision of the Supreme Court, duly entered of record, and properly certified to the court from which the appeal was taken, is conclusive on that court, and can not be there assailed on account of errors or defects which do not render it void on its face; the only remedy being by petition, or other appropriate proceeding, in the Supreme Court. *Donnell v. Hamilton*, 610.
 8. *Same; power over judgment after expiration of term.*—The Supreme Court can not set aside a judgment or decree rendered by it, after the expiration of the term at which it was rendered, unless the same is void on its face. *Ib.* 610.
 9. *Special court.*—When two of the justices of the Supreme Court are disqualified to sit in a cause, the parties may consent, by agreement entered of record, that the case shall be submitted to the decision of the remaining justice, and that his decision shall be entered up as the decision of the court; or that two attorneys of the court, named in the agreement, shall be associated with him, and that the decision of the three, or a majority of them, shall be entered up as the judgment of the court; and if one of the attorneys so selected dies before judgment is rendered, the decision of the justice and the surviving attorney, afterwards rendered, and regularly entered up as the judgment of the Supreme Court, is valid and binding on the parties, and can neither be assailed in the court below, to which the cause is remanded by judgment and certificate regular on their face, nor in the Supreme Court after the expiration of the term at which it is regularly entered. *Donnell v. Hamilton*, 610.
 10. *Action on judgment.*—Under the statutes dissolving the corporation called *City of Selma*, and creating a new corporation called *Selma*, an action at law may be maintained against the new corporation, on a judgment recovered against the former before its dissolution. *Amy & Co. v. Selma*, 103.
 11. *Lien of judgment and execution.*—Under our statutes, a judgment is not a lien on the defendant's property, real or personal, but a lien is created by the issue of an execution and its delivery to the sheriff (Code, § 3210); which lien continues, so long as executions are regularly issued without the lapse of an entire term; but, when the lien has been once lost, by the lapse of an entire term without an execution, it can not be revived, so as to give it continuous force as if there had been no chasm, though a new lien may be acquired by a subsequent execution. *Perkins v. Brierfield Iron & Coal Co.*, 403.
 12. *Lien of judgments of Federal courts.*—In the absence of legislation by Congress, the lien of judgments rendered by the Federal courts depends on State laws; and by express provision (U. S. Rev. Stat., § 967), the lien of such judgments ceases "in the same manner, and at like periods," as the judgments of the State courts. *Ib.* 403.
 13. *Payment of judgment to justice.*—The payment of the judgment by the defendant to the justice of the peace, without an acceptance of the money by the plaintiff, does not bar the plaintiff's right to sue out an appeal or *certiorari*. *Grantham v. Payne*, 584.
 14. *Judgment in civil suit; admissibility as evidence in criminal prosecution.*—A judgment recovered against a defaulting tax-collector and his sureties, in a civil action at the suit of the county, is not competent evidence against him in a subsequent criminal prosecution for the default. *Britton v. The State*, 202.
 15. *Decree construed, as affected by consent and agreement of record.*—A

JUDGMENTS AND DECREES—*Continued.*

decree in a chancery cause, rendered under a submission on pleadings and proof, held the complainant, a married woman, entitled to relief; vested the lands in controversy in her, "as her separate estate under the laws of this State;" perpetually enjoined the defendants, purchasers at execution sale against her husband, from the further prosecution of their action at law, and then added: "And the defendants having agreed to assent to this decree, and to release all errors, as shown by their agreement hereunder written, it is by consent further ordered and decreed, that the complainant's next friend pay the costs of this suit," &c. The agreement was signed by the solicitors of both parties, and was in these words: "We hereby assent to the foregoing decree, and hereby release all errors." *Held*, that the agreement only extended to a release of errors on one side and the assumption of costs on the other, and did not show that the decree was rendered by consent, so far as it affected the character of the complainant's estate in the lands. *Lee v. Lee*, 412.

16. *Decree declaring lands to belong to married woman* "as her separate estate under the laws of this State;" whether estate is statutory or equitable.—Under a decree in a chancery cause, rendered in 1875 (before the decision in *Short v. Battle*, 52 Ala. 456, re-established the distinction between the statutory and equitable estates of married women), enjoining actions at law by purchasers at execution sale against the husband, and vesting the title to the lands in controversy in the wife, who was the complainant, "as her separate estate under the laws of this State;" these words "are of doubtful import on their face," and the court does not decide whether they create a statutory or an equitable estate; but they do not establish an intended change in the character of the complainant's estate, as shown by the pleadings and proof. *Ib.* 412.
17. *Decree for sale of lands, "subject to mortgages."*—In a suit by judgment creditors of the husband, seeking to set aside as fraudulent a conveyance of lands to the wife, and to subject the land by sale to the satisfaction of their judgments; subsequent mortgagees of the husband and wife having intervened, asserting their rights, and claiming protection as purchasers for valuable consideration without notice; *held*, that a decree in favor of the complainants, ordering the lands to be sold "subject to the said mortgages," was a recognition and determination of the validity of the mortgages, and estopped the complainants from assailing their validity, in a subsequent suit seeking to redeem from the purchasers at the sale under the decree, who afterwards succeeded by purchase to the rights of the mortgagees. *Holden v. Rison & Co.*, 515.

JURISDICTION.

1. Of justice of the peace, see that title.
2. Of Probate Court, in grant of administration, see EXECUTORS AND ADMINISTRATORS; and in matter of probate of wills, see WILLS, 1, 2.

JURORS AND JURY.

1. *Struck jury.*—Under the statute giving "either party," in a civil action, the right to demand a struck jury (Code, § 3018), all the persons litigant on one side, whether as plaintiffs or as defendants, are regarded as one party; and where there are several defendants, having different defenses, the right of the plaintiff to a struck jury can not be defeated, because they can not agree among themselves as to the names to be struck off, but the court may, in such case, allow each defendant to strike off a name in rotation. *M. & E. Railway Co. v. Thompson*, 448.

JURORS AND JURY—*Continued.*

2. *Competency of juror, as affected by fixed opinion.*—A person summoned as a juror, who states, on his *voir dire*, that he has a fixed opinion as to the guilt of the defendant, which would bias his verdict, if the facts proved were as he had heard them, but, if the facts differed from what he had heard, he believed he would not be biased, but would act on the facts as proved, is not competent as a juror.—Code, § 4881. (The court is “unwilling to extend the rule in *Bales v. The State*, 63 Ala. 30.) *Jackson v. The State*, 18.
3. *Challenge of juror for cause; waiver of right.*—The officer before whom the preliminary examination of the defendants was had, and by whom they were committed to jail to await the action of the grand jury, being summoned as a regular juror, and being accepted without objection, after examination by the court, in the presence of the defendants, touching his qualifications as a juror; whether the failure to challenge him was the result of ignorance or inadvertence, the right of challenge was lost when he was accepted and sworn as a juror; and a subsequent motion to excuse or set him aside, on his own statement of the facts to the court, saying that he had not recognized the defendants when first examined, and that he had a fixed opinion which would bias his verdict, is addressed to the discretion of the court. *Henry v. The State*, 75.
4. *Special venire in criminal cases; when authorized or necessary, and how organized.* *Jackson v. The State*, 18; *De Arman v. The State*, 10; *Martin v. The State*, 1.
5. *Polling jury, in criminal case.* *Prior v. State*, 56.

JUSTICE OF THE PEACE.

1. *Jurisdiction in criminal cases.*—While a justice of the peace is sitting for the trial of a case on its merits, whether civil or criminal, it may be that his court is one of limited or inferior jurisdiction, and that nothing will be intended to be within its jurisdiction except what affirmatively appears from the papers and proceedings in the cause; but, when the justice is sitting as an examining court, on the preliminary investigation of a criminal charge, this principle does not apply, and it is not necessary that his authority to act should affirmatively appear on the face of the proceedings, in order to support their validity when collaterally assailed. *Boyn-ton v. The State*, 29.
2. *Justice acting as coroner.*—A justice of the peace may act as coroner when that officer “is absent from the county, or unable to act” (Code, § 4003); and when an inquest is held by a justice as coroner, a warrant of arrest founded on the verdict will support the jurisdiction of a committing magistrate, when collaterally assailed, no objection having been raised to the proceedings by motion to quash or otherwise, although it is not affirmatively shown that the coroner was absent, or unable to act. *Ib.* 29.
3. *Proceedings of justices on preliminary investigation, when acting outside of beat, or one is incompetent to sit.*—When a justice of the peace issues a warrant of arrest, returnable before himself, he may associate with him, on the trial of the preliminary investigation, “one or more magistrates of equal grade” (Code, § 4693); and it is no objection to the validity of their proceedings when thus sitting, that the associate justices are acting outside of their respective beats or precincts; nor are their proceedings void, because one of the associates was incompetent to sit. *Ib.* 29.
4. *Appeal and certiorari from justice's judgment; trial de novo, and amendment of complaint.*—When a cause is removed from a justice's court into the Circuit Court, either by appeal or by *certiorari*, it is triable *de novo*, without regard to any defect in the proceedings (Code, § 3121); and a trial may be there had on the original com-

JUSTICE OF THE PEACE—*Continued.*

- plaint, which may be amended, or a new complaint may be filed. *Littleton v. Clayton*, 571.
5. *Certiorari to justice's judgment; limitation of.*—It is no objection to a *certiorari*, when sued out to review a judgment rendered by a justice of the peace, that it was sued out after the expiration of the five days allowed for taking an appeal (Code, § 3654); the limitation of the writ, in such case, "would probably be one year." *Grantham v. Payne*, 584.
 6. *Payment of judgment to justice.*—The payment of the judgment by the defendant to the justice of the peace, without an acceptance of the money by the plaintiff, does not bar the plaintiff's right to sue out an appeal or *certiorari*. *Ib.* 584.
 7. *Costs, in appeals from magistrates.*—In an action to recover damages for a tort, if the plaintiff does not recover more than twenty dollars, he can recover no more costs than damages, in the absence of a certificate by the presiding judge that he ought to have recovered more (Code, § 3129); but this provision does not apply to actions commenced in a justice's court, and removed by appeal or *certiorari* into the Circuit Court, as to which special provision is made for the taxation or apportionment of the costs (Code, § 3124). *Baker v. Keith*, 544.
 8. *Execution issued by justice of the peace, and sent to another county.* An execution issued by a justice of the peace, and sent to another county to be executed, must be authenticated by the certificate of the probate judge, or of a justice of the peace of the latter county who is acquainted with his handwriting (Code, § 3647); and if not so authenticated, a levy under it is void. *Street v. McClerkin*, 580.

LANDLORD AND TENANT.

1. *Verbal lease for one year, commencing at future day.*—Although a verbal lease for the term of one year, to commence at a future day, is void under the statute of frauds (Code, § 2121); yet, if the tenant takes possession under the lease, and pays the rent as stipulated, this imparts validity to the contract, creates the relation of landlord and tenant between the parties, and gives the landlord a right to an attachment against the crop for advances made during the year. *Martin v. Blanchett*, 288.
2. *Affidavit for attachment.*—An affidavit for an attachment, sued out by a landlord against his tenant, for advances to make a crop (Code, §§ 3467, 3469, 3472-3), is to be liberally construed, and is sufficient if it sets forth with substantial accuracy the general jurisdictional facts, either expressly, or by necessary implication; nor is it necessary to negative conclusions or inferences to the contrary. *Gunter v. DuBose*, 326.
3. *Same.*—When an attachment is sued out on 30th December, claiming an indebtedness for advances made to enable the defendant to make a crop on lands rented from the plaintiff, but not stating for what year, the necessary and reasonable implication is, that the advances were made during the year just expiring; and if in fact any part was made during the preceding year, a balance remaining unpaid at the end of the year, such balance becomes a part of the advances for the next year, while the tenancy continues, and may be recovered under such affidavit; but it is the better practice to state the particular facts as they are. *Ib.* 326.
4. *Landlord's lien for advances.*—The landlord's lien for advances is placed by the statute on the same basis of equality as his lien for rent (Code, § 3469; Sess. Acts 1878-9, p. 72); any balance remaining due at the end of the year, the tenancy continuing for another year, is regarded as advances made on the crop of that year, and

LANDLORD AND TENANT.—*Continued.*

is protected by the lien of that year; and it is not necessary that the same lands shall be cultivated each year. *Thompson v. Powell*, 291.

5. *Action by landlord, against purchaser of tenant's crop.*—An action on the case lies in favor of the landlord, against one who, having knowledge or notice of the landlord's statutory lien, purchases from the tenant the crops grown on the rented lands, and removes or converts them, whereby the lien was lost or destroyed. *Ib.* 391.
6. *Action for damages, by mortgagee of crops; against landlord with prior lien.*—A mortgagee of crops grown on rented lands may maintain a special action on the case against the landlord, who, having notice of the mortgage, seized and sold the entire crop under his prior lien for rent and advances, the proceeds of sale exceeding the amount of his claim; and is entitled to recover the excess. *Hamilton v. Maas & Brother*, 283.
7. *Conflicting liens for rent, advances, and under mortgage of crops.* The landlord's lien for rent (Code, § 3467) is superior to that of a mortgagee of the crops, though the mortgage was given before the beginning of the year; and if the landlord makes advances to enable his tenant to raise a crop, not only on the rented lands, but also on other lands owned by the tenant himself, taking a crop-lien note and mortgage (Code, §§ 3286-7), the lien of this instrument is superior to that of the prior mortgage, if the latter was given only for an antecedent debt; but the lien of the mortgage must prevail at law, against a note given for the unpaid purchase-money of land, though called rent, and payable in cotton, and assigned to the landlord of the maker. *Ib.* 283.
8. *Estoppel as between landlord and tenant.*—When a tenant enters into the possession on the faith of his lease, or, being in possession, is permitted to remain on recognition of the landlord's title, he is estopped from setting up an outstanding title in defense of an action by his landlord during the continuance of his estate. *Caldwell v. Smith*, 157.
9. *Same.*—A tenant can not dispute the title of the landlord under whom he entered, while still holding under him, but must first surrender the possession in good faith; it is not enough that he left the possession for a few days, without notice to his landlord, and again resumed it by collusion with another person. *Littleton v. Clayton*, 571.
10. *Same.*—Actual prior possession by plaintiff is necessary to the maintenance of an action for unlawful detainer; yet, where the action is brought by a landlord, against his tenant holding over, the defendant is estopped from disputing the fact of such prior possession by plaintiff. *King v. Bolling*, 594.
11. *Same.*—The uninterrupted occupation of the premises by defendant for three years before the commencement of the action, his estate not being determined, is a bar to the action (Code, § 3705); but a tenant holding over can not set up such three years possession as a bar, when he has paid, or promised to pay rent, during that period. *Ib.* 594.

LARCENY. See CRIMINAL LAW, 72-3.

LICENSE. See CRIMINAL LAW, 83-4.

LIEN. See JUDGMENTS AND DECREES.

LIMITATIONS, STATUTE OF.

1. *Admission of subsisting debt; effect in avoiding bar of statutes of non-claim and limitations.*—An admission that a claim is a subsisting

LIMITATIONS, STATUTE OF—*Continued.*

- debt, necessarily implies its due presentment, which would avoid the bar of the statute of non-claim; but not of the statute of limitations (Code, § 3240), which requires a partial payment before the bar is complete, or an unconditional promise in writing signed by the party to be charged thereby. *Grimball v. Mastin*, 553.
2. *Subsequent promise to pay debt already barred.*—A debt which is barred by the statute of limitations, is a sufficient consideration to support a subsequent promise to pay it, if such promise is expressed as required by the statute; and a debt of the ancestor, which is a charge on his lands, though barred by the statute of limitations, will support a subsequent promise to pay by the heirs or devisees. *Ib.* 553.
 3. *Statute of limitations in favor of fraudulent grantee.*—The limitation in favor of a fraudulent grantee of land, against creditors of his grantor, is ten years; and in cases of fraud, the creditor is allowed an additional period of one year after the discovery of the fraud (Code, § 3242); but this is not an exception restricting the general limitation to one year. *Proskauer v. People's Savings Bank*, 257.

MORTGAGE.

1. *Mortgage, or conditional sale; construction of conveyance.*—An instrument can not operate as a mortgage, and at the same time as a conditional sale; and when it contains repugnant provisions, rendering its character doubtful, it will be construed as a mortgage rather than as a conditional sale. *Rapier v. Gulf City Paper Co.*, 126.
2. *Same.*—The existence of a debt, which had been reduced to judgment, and the preservation of which, with its execution lien on the property conveyed, is expressly provided for in the instrument, with the right to levy on any other property of the debtor, if the debt is not paid in installments as specified, stamps the character of the instrument as a mortgage, although it is called a "bill of sale," and although it declares that the grantee "becomes in all things the absolute owner of said property, the said party of the first part having only the right to re-purchase the said property upon the consideration and conditions named." *Ib.* 126.
3. *Usury in mortgage; stipulations construed.*—A provision in a mortgage for the payment of \$2,500 within thirty days, "and securing to be paid" in installments, "as hereinafter stated, all debts that may at the time be due to said party of the second part from the party of the first part, with the interest thereon, and all reasonable costs, charges, fees and expenses," does not, *per se*, render the mortgage usurious; the stipulation being susceptible of the construction, that the \$2,500 was to be a partial payment on the debt, and not as a *bonus* in addition to it. *Ib.* 126.
4. *Same.*—The mortgaged property consisting of a newspaper office, with job-printing office attached, which had been conducted at a loss by the mortgagors, the mortgage is not rendered usurious by a stipulation that the mortgagee shall not be liable "for any profit or revenue he may derive from the use of the property." *Ib.* 126.
5. *When absolute conveyance will be declared mortgage, and therefore fraudulent as against creditors.*—A conveyance which, though absolute on its face, was intended to operate only as a mortgage, or security for a debt, is fraudulent and void as against the creditors of the grantor; but it will not be so declared at their instance, unless the evidence is clear and convincing, since the law never strives to force conclusions of fraud. *Danner Land & Lumber Co. v. Stonewall Ins. Co.*, 184.
6. *Absolute conveyance, with subsequent agreement for re-purchase; re-*

MORTGAGE—Continued.

tention of possession by vendor, as badge of fraud; agreement not to record deed.—A conveyance which is absolute on its face will not be declared a mortgage, and therefore fraudulent as against creditors, because it is shown that, a few days after the consummation of the transaction, the parties entered into a new contract in writing, by which the purchaser gave the vendor a right to repurchase the property at the same price; nor will the transaction be held fraudulent, because the vendor remained in possession after the sale, when it is shown that this was under an agreement to pay rent; nor because the grantee agreed to withhold the deed from record, for fear of injuring the credit of the grantor, but nevertheless did record it by advice of his attorney. *Ib.* 184.

7. *Equitable mortgage; writing held insufficient.*—A letter addressed to a merchant, in these words: "*I am always the man to do right. If you think it proper to put the guano in the paper that Mr. H. has against me and my boys, it will be all right with me,*" is not so free from ambiguity as to authorize the court to construe it as a verbal mortgage for the price of the guano, operating in *præsenti*. *Knox v. Wilson*, 309.
8. *Foreclosure of mortgage; money decree against mortgagor.*—On the foreclosure of a mortgage in equity, a personal decree may be rendered against the mortgagor in the first instance, for the amount due on the mortgage debt, as ascertained under a reference; although an execution can not be issued on such decree (Code, § 3908), until after the mortgaged property has been sold and the sale has been confirmed, and then only for the balance remaining due. *McCall v. Rogers*, 349.
9. *Foreclosure of mortgage, when debt is payable in installments.*—When the mortgage debt is payable in installments, and default is made in the payment of one of them, the mortgage may be at once foreclosed, and a sale of the property decreed, without waiting for the maturity of the other installments; unless this construction is repelled, expressly or by implication, by the terms of the instrument itself, which is to be construed most strongly against the mortgagor. *Johnson v. Buckhaults*, 276.
10. *Same; construction of mortgage.*—Where the mortgage debt is evidenced by a written instrument in the form of a promissory note, by which the mortgagors promise to pay and deliver twenty-four bales of cotton, in three annual installments of eight bales each; and the mortgage is conditioned, "that if we [they] pay the said note on or before it becomes due," with cost of recording, "then this conveyance to be void; but, if we [they] fail to pay said sum when due, then said B., his agents or assigns, are authorized to take possession of any or all of said property, and sell the same at public outcry for cash," after giving notice as prescribed, "and out of the proceeds of such sale to pay, first, the costs and expenses, and all costs of collecting; second, the amount, with interest, that may be due on the debt above mentioned, and the residue, if any, to the undersigned," mortgagors; the mortgage may be foreclosed, on default being made in the payment and delivery of the first installment of cotton, although the other installments are not due. *Ib.* 276.
11. *Application of proceeds of sale of mortgaged property.*—When mortgaged property is sold under the mortgage, the mortgagee must apply the proceeds of sale to the payment of the mortgage debt, without any special directions from the mortgagor; and he can not apply the money to another debt, without the consent of the mortgagor. *Johnson v. Thomas*, 367.
12. *Set-off in equity against mortgage debt.*—When the mortgagee files a bill to foreclose, the mortgagor may set up any defense, except

MORTGAGE—*Continued.*

the statute of limitations, which would be available at law in an action on the debt; and hence he may, in extinguishment or redemption of the mortgage debt, set off any other debt or demand which would be available at law; but, when the bill is filed by the mortgagor himself, seeking to enjoin a sale of the property under a power in the mortgage, he must show some other ground for equitable interference, before he can establish as a set-off an independent debt or demand, for which he has an adequate remedy at law. *Knight v. Drane*, 371.

13. *Sale by mortgagee, not pursuant to power; rights of assignee.*—A sale of the lands by the mortgagee, not in pursuance of the power contained in the mortgage, is not a valid foreclosure, but operates only as an equitable assignment of the mortgage; and the assignee (or purchaser) acquires thereby no higher rights than the mortgagee himself possessed. *Sauyers v. Baker*, 461.
14. *Proof of mortgage, where mortgagor and attesting witnesses sign by mark only.*—When a mortgage of personalty is signed by the mortgagor by mark only, and each of the subscribing witnesses signs by mark only, and neither of them is able to identify the paper or any of the marks, the execution of the instrument may be proved by the testimony of the mortgagee himself, or of any other person who saw the maker execute it; and it may be admitted as evidence on such proof, without more. *Jones v. Hough*, 437.
15. *Whether conveyance is mortgage or crop-lien for advances.*—An instrument conveying the crops to be grown during the year, in form declaring a statutory lien for advances made and to be made (Code, §§ 3286-7), is effective only as a mortgage, on proof that it was given to secure an antecedent debt, and that no advances were in fact made on the faith of it. *Hamilton v. Maas & Brother*, 283.
16. *Description of personal property conveyed.*—A mortgage which conveys "all of the crops of corn, cotton and cotton-seed, and crops of every other name and description, to be grown this year in said county," is not void for uncertainty, but is valid and operative to convey all the crops grown in said county by the grantor or mortgagor. *Ib.* 283.
17. *Validity of mortgage, as against prior judgment.*—As against a judgment, which is evidence of an indebtedness from the date of its rendition, a mortgage subsequently executed by the debtor, in the absence of proof of its consideration, must be adjudged voluntary, and constructively fraudulent; but, as between the parties, the mortgage is valid, and confers on the mortgagee a title on which he may maintain an action against any one who does not connect himself with the judgment. *Street v. McClerkin*, 580.
18. *Mortgage construed as intended for indemnity of surety, and enuring to benefit of creditor.*—A mortgage, executed by a guardian to the surety on his official bond, conditioned that he "shall manage said guardianship in the terms of the law," and, if he "fails to comply with the terms of the law in the said guardianship, and cause loss by the said" surety, authorizing him to sell, and to apply the proceeds to the "payment of said loss," enures to the benefit of the ward, and may be enforced by him, on failure of the guardian to pay the amount adjudged against him on final settlement of his accounts. *Daniel v. Hunt*, 567.
19. *Foreclosure of mortgage; what defenses are available.*—Against a bill to enforce or foreclose a mortgage, any defense may be set up which would be available at law, in an action on the secured debt, except the statute of limitations. *Grimball v. Mastin*, 553.
20. *Same; want of consideration as defense, and how taken.*—When a want of consideration is shown by the averments of the bill, or by the recitals of the mortgage, which is made an exhibit to the

MORTGAGE—*Continued.*

- bill, the defense may be taken by demurrer, or by motion to dismiss for want of equity; but, in other cases, it must be taken by plea or answer; and the recitals of the mortgage, as to the consideration, may be contradicted by parol evidence. *Ib.* 553.
21. *Consideration of mortgage; sufficiency of recitals, on demurrer.*—A recital of "ten dollars in hand paid," as the consideration of a mortgage, is sufficient to sustain it on demurrer for want of consideration, in the absence of all other evidence. *Ib.* 553.
 22. *Plea of tender by mortgagor, to purchaser at mortgage sale.*—A plea of tender, not accompanied with the payment of the money to the clerk of the court, is demurrable (Code, § 2997); and this provision applies to a plea of tender interposed by the mortgagor in defense of an action by the purchaser at a sale under the mortgage, although it is declared by another statute (§ 2879) that the tender "has the effect to re-invest him with the title." *Caldwell v. Smith*, 157.
 23. *Tender in bill to redeem.*—In a bill to redeem under a mortgage, it is always necessary to tender the amount due, unless it is averred that nothing is in fact due; and the only safe plan is to tender what may be found due, even when averring that nothing is due. *Tatum Bros. v. Walker*, 563.
 24. *Filing bill in double aspect, asking cancellation of mortgage, or redemption under it.*—A bill can not pray to have a mortgage set aside and cancelled, as inoperative and void, or, in the alternative, for an account and redemption under it; and if the original bill prays the former relief only, an amendment asking the other, in the alternative, can not be allowed. *Ib.* 563.
 25. *Bill for redemption under mortgage; who may file.*—No person can come into a court of equity for a redemption of a mortgage, but one who is entitled to the legal estate of the mortgagor, or claims a subsisting interest under him; and where the husband, as trustee, joins with his wife in a mortgage of her lands, an assignee or purchaser from him can not maintain a bill to redeem. *Holden v. Rison & Co.*, 515.
 26. *Decree in chancery for sale of lands, "subject to mortgages."*—In a suit by judgment creditors of the husband, seeking to set aside as fraudulent a conveyance of lands to the wife, and to subject the land by sale to the satisfaction of their judgments; subsequent mortgagees of the husband and wife having intervened, asserting their rights, and claiming protection as purchasers for valuable consideration without notice; held, that a decree in favor of the complainants, ordering the lands to be sold "subject to the said mortgages," was a recognition and determination of the validity of the mortgages, and estopped the complainants from assailing their validity, in a subsequent suit seeking to redeem from the purchasers at the sale under the decree, who afterwards succeeded by purchase to the rights of the mortgagees. *Ib.* 515.
 27. *Redemption of real estate; what are "lawful charges;" sale under power in mortgage.*—If, in such case, the mortgages had not been foreclosed, at the time the decree ordering the sale was rendered, by a sale under the powers therein contained, their validity being thus recognized by the decree, they constituted a "lawful charge" on the property, which the judgment creditors, seeking to redeem, were required to pay or tender; and if they had been thus foreclosed, whereby the equity of redemption was cut off, and only a statutory right of redemption remained in the mortgagor, the purchasers at the sale under the decree acquired nothing which could be redeemed by a judgment creditor. *Ib.* 515.
 28. *Protection to mortgagee, as bona fide purchaser.*—A mortgagee of property purchased with trust funds, if he had no notice of that

MORTGAGE—*Continued.*

fact, and is a *bona fide* purchaser for value, is entitled to protection against the implied trust arising from such investment of the trust funds; but, if the debt secured by the mortgage is tainted with usury, he is not a *bona fide* purchaser for valuable consideration. *McCall v. Rogers*, 349.

29. *Same.*—When the heirs and distributees of an intestate's estate voluntarily make an agreement among themselves for a division of the lands, each executing to the administratrix his note for the agreed value of the land allotted to him, to be paid and adjusted on final settlement of the estate, liens being retained and declared on each one's portion for his indebtedness; although the agreement is not recorded, the administratrix may enforce a vendor's lien against one portion of the land, as against a mortgagee of the heir to whom it was allotted, to the extent of the interest acquired by him under the agreement; but, as to the interest therein inherited by the mortgagor, the mortgagee may claim protection as a purchaser without notice, if he is also a purchaser for value. *Jones & DePras v. Robinson*, 499.
30. *Same.*—A mortgage, when given only to secure an antecedent debt, does not entitle the mortgagee to protection in equity as a purchaser for valuable consideration; but, when given to secure a debt contemporaneously contracted, or in consideration of the extension of an antecedent debt, this makes a valuable consideration, and entitles the mortgagee to such protection. *Ib.* 499.
31. *Same.*—If the lands assigned to the husband, by the deed of partition, are afterwards mortgaged by him and his wife, as security for his debt, the mortgagee can not claim protection as a *bona fide* purchaser without notice, on account of the deed of partition, but is charged with notice of all the facts shown by the records of the Probate Court, relative to the purchase by the wife at an administrator's sale, which is mentioned in the deed. *Harden v. Darwin & Pulley*, 473.

NAVIGABLE STREAMS.

1. *What streams are navigable.*—A river or stream above tide-water is, *prima facie*, private, and not subject to the public right of floating or rafting timber; but it will be held navigable, or subject to the public right of user, on proof that it has, in its natural state, sufficient depth and width to be used for the transportation of timber or logs, or the products of the forest, the mines, or the tillage of the country along its banks, to market; not necessarily at all seasons of the year, but periodically, and for a time long enough at each period to make it susceptible of beneficial use to the public. *Lewis v. Lee County*, 190.
2. *Same.*—Under the tests and rules established by the former decisions of this court and other authorities, Pea River in Coffee county can not be considered a navigable stream, when the evidence only shows that it is "a stream upon which logs could be floated only at high water, or during a freshet, by the public generally, to Pensacola, Florida, where it was generally marketed" *Ib.* 190.

NEGLECT.

1. *Injuries caused by traps and pitfalls; liability of owner for damages.* All persons, whether natural or artificial, who own lands on which the public is invited, expressly or impliedly, to enter, are bound to keep such lands free from traps and pitfalls, and are liable in damages at the suit of any person injured by the neglect of this duty; but the principle does not extend to places which are

NEGLIGENCE—*Continued.*

- strictly private, or to which the public is neither invited nor expected to go. *M. & E. Railway Co. v. Thompson*, 448.
2. *Same, as applied to railroad companies.*—All the property of a railroad company, including its depots and adjacent yards and grounds, is its private property, on which no one is invited, or can claim a right to enter, except those persons who have business with the railroad; which class embraces, not only passengers, but protectors and friends attendant on their departure, or awaiting their arrival. *Ib.* 448.
 3. *Same.*—To the class of persons thus having business, the railroad company is under obligation to keep in safe condition all parts of its platforms, with the approaches thereto, to which the public do, or would naturally resort, and all portions of the station-grounds reasonably near to the platform, where passengers would be likely to go, and to provide safe waiting-rooms, and to keep the depot and platform well lighted at night; but, to the public at large, the company owes "nothing beyond the observance of the duties of good neighborhood," which includes "the universal duty of doing no willful or wanton injury, and of not erecting or continuing, on or near its platform or approaches, to which the public may be expected to go, any nuisance, trap, or pitfall, from which personal injury is likely to ensue." *Ib.* 448.
 4. *Liability of owners and lessees of railroad.*—The building in the city of Montgomery known as the "Union Depot," with the yard or grounds annexed, is the property of the two railroad companies known as the South and North Alabama, and the Louisville and Nashville; but the Montgomery and Eufaula railroad company, having acquired by lease, at a stipulated rent, the right to use the property in common with them, for the arrival and departure of its trains, with the use of its waiting rooms, ticket-offices, baggage-room, &c., is liable to passengers and the public generally, in relation to the property, as if it were the owner in fee. *Ib.* 448.
 5. *Contributory negligence as defense.*—To an action against a railroad company, to recover damages on account of personal injuries sustained from a neglect of this duty [to keep its depot grounds and approaches in safe condition], contributory negligence on the part of the plaintiff himself is a complete defense. *Ib.* 448.
 6. *Application of these principles to case at bar.*—The plaintiff in this case came to Montgomery on the Montgomery and Eufaula railroad, and, on alighting from the train at the Union Depot, desiring to find a privy, made inquiry of a stranger, who pointed in the direction of a privy erected on the bank of the river, at the further end of the platform, about fifty yards from the depot; and in trying to find it, he wandered beyond it in the dark, fell down the steep bluff, and sustained serious injuries. The railroad platform was well lighted, and extended from the depot to the river; but there was no light at the privy, and a house intervened between it and the lights on the platform. *Held*, on these facts, that the plaintiff had no cause of action against the railroad companies who owned the property, as to them being a mere stranger; and that he could not recover against the Montgomery and Eufaula corporation, lessees of the property, because, being acquainted with the locality, he was guilty of contributory negligence in attempting to find the privy without further inquiry. *Ib.* 448.
 7. *Liability of railroad company, for injuries to persons or property by negligence; burden of proof.*—The liability of a railroad company for damages resulting from a failure to comply with statutory requirements, or from other negligence, whether to persons, or to stock or other property, is the same (Code, §§ 1699, 1700); but, where the injury is to stock or other property, the *onus* of show-

NEGLIGENCE—*Continued.*

ing a compliance with the statutory requirements is imposed on the railroad company, and without this proof it does not relieve itself of the imputation of negligence; but the statute does not extend this rule to actions for personal injuries. *Clements v. Railroad Co.*, 533.

8. *Contributory negligence as defense.*—The court does not assent to the proposition, that contributory negligence on the part of the plaintiff, though proximate, is no defense to the action, if the railroad company was guilty of negligence, or omission of duty, which aided in bringing about the injury. *Ib.* 533.
9. *Liability of railroad company, for injuries to stock; statutory provisions.*—The statutory provisions prescribing certain duties to be performed by railroad engineers "on perceiving an obstruction on the track of the road," making the railroad company liable for all damages to persons, stock or other property, resulting from a failure to comply with these requirements, and imposing on it, in an action for damages, the *onus* of proving compliance (Code, §§ 1699, 1700), only apply when there is an obstruction on the track of the road, against which the engine or train, running its proper course and direction, may strike, and it is perceived by the engineer; nor do the statutory duty and liability arise, when an animal suddenly springs on the track in front of the engine, in such close proximity that human appliances can not avoid a collision. *Railroad Co. v. Bayliss*, 429.
10. *Same, at common law.*—As to an animal running by the side of the track, though on the railroad's right of way, the duties of the engineer and the liability of the company for damages are to be determined by the principles of the common law, which require that the engineer should use the same care and diligence which a careful and prudent man, handling agencies of similar hazard and power, would use in the management of his own business; and the rule is the same, whether the animal is seen by the engineer, or is not seen because of his failure to observe proper watchfulness, so far as consistent with the performance of other duties equally imperative. *Ib.* 429.
11. *Averment of negligence.*—If the complaint alleges that three of the plaintiff's cattle, particularly describing them, "were killed, and the other was injured or damaged to the value of ten dollars, by the negligence of the defendant in running a train of cars and locomotives on said railroad, and thus became wholly lost to plaintiff;" this is a sufficient averment that the injury was caused by the negligence of the defendant. *Railroad Co. v. Carloss*, 443.

NEW TRIAL.

1. *Refusal not revisable.*—The refusal of a new trial is not revisable by this court, on error or appeal. *Bedwell v. Bedwell*, 587.

NON-CLAIM.

1. *Non-claim as defense; averment of presentment.*—When the bill seeks to enforce against a decedent's estate a claim which is, *prima facie*, within the bar of the statute of non-claim (Code, § 2597), and fails to aver the due presentment of the claim, or facts excepting it from the operation of the statute, it is subject to demurrer; and an averment of an admission by the personal representative, of such presentment, is not the equivalent of an averment of the fact itself. *Grimball v. Mastin*, 553.
2. *Same.*—When the purpose of the bill is to enforce, not the original debt or claim against the decedent's estate, but a subsequent promise by the heirs or devisees, founded on a valid claim against

NON-CLAIM—*Continued.*

their ancestor, and a lien created by them for its payment or performance, the bar of the statute of non-claim comes collaterally in question, as affecting the consideration of the subsequent promise, and it is not necessary that the bill should aver presentment. *Ib.* 553.

3. *Same.*—A creditor, having recovered separate judgments against the principal debtor and his surety, and seeking by bill in equity to subject to the satisfaction of the judgment against the surety a tract of land to which he had the legal title when the debt was contracted, but which, in fraud of his creditors, he afterwards conveyed to his principal; the bill is not multifarious because the heirs of the deceased principal are made parties, the legal title being vested in them, and no relief being prayed as to the judgment against their ancestor; nor can they set up the statute of non-claim as a defense, because that judgment has not been duly presented as a claim against his estate, within eighteen months after the grant of letters of administration, or nine months after the declaration of insolvency. *Larkin v. Mead*, 485.

PARTITION. See CHANCERY, 26–29.

PARTNERSHIP.

1. *Rights of surviving partner.*—The death of one partner invests the survivor with the exclusive right of possession and management of the whole partnership business and property, including *choses* in action as well as *choses* in possession; but he holds in trust for all persons interested in the partnership—the creditors of the firm, and the representatives of the deceased, as well as for himself—and his duty is to settle and close the concern, without unnecessary delay, in the best manner for all parties interested. *Davis v. Sowell & Co.*, 262.
2. *Same.*—Where there are two surviving partners, this right and this duty devolve equally upon both; and a delivery or payment to either is a discharge from all liability or obligation to the other. *Ib.* 262.
3. *Same.*—If the partnership had entered into an executory contract, which was only partially performed at the death of the deceased, his death does not absolve either party from performance, in the absence of an express stipulation to that effect; and the existence of the partnership, with its active functions, to be exercised by the survivor, is continued until the contract has been fully performed. *Ib.* 262.
3. *Remedies, legal and equitable, of surviving partner.*—The partnership having entered into a contract with the deceased partner while living, for the sale to him of a large quantity of lumber, in the manufacture of which the partnership was engaged, to be delivered during a period of several months, as required to fill his private contract with an exporting company; and, on the destruction of the mills of the partnership by fire, after the death of the deceased partner, the survivor having contracted with the owners of another mill for the manufacture and delivery of the lumber necessary to complete the contract; if such sub-contractors fail or refuse to deliver the lumber as stipulated, the survivor may maintain an action against them for the breach; if, ignoring his rights, they deliver the lumber to the executor of the deceased partner, the possession of the latter would be wrongful, and he would be liable personally to the surviving partner for any disposition he might make of the lumber; and if he applied it in part performance of his testator's contract with the exporting company, the surviving partner might maintain an action against the estate of

PARTNERSHIP—*Continued.*

the deceased, as for goods sold and delivered. Hence, having these remedies at law, the surviving partner can not maintain a bill in chancery on these facts, without averring other facts which show the necessity for equitable interference. *Ib.* 262.

PAYMENT.

1. *Payment of bill as between drawer and discounting bank.*—When a bank has discounted a bill of exchange for the drawer, and still retains the ownership and control of it, an acceptance of a conveyance of property from the drawer, in absolute discharge of his liability, extinguishes the bill as a legal liability. *Williams, Deacon & Co. v. Jones*, 294.
2. *Wrongful payment, and ratification thereof.*—If the drawer of the bill, having notice of the fact that the discounting bank has transferred it for collection to its business correspondent, and that the latter has acquired a lien by advancing money on the faith of it before maturity, pays the bill to the discounting bank, the payment is wrongfully made, and wrongfully accepted, and does not discharge the drawer from liability to the bank or person having the lien, unless ratified; and if the payment was made in property, which remains in specie, the discounting bank holds such property in trust for its correspondent, if the latter elects to ratify the payment. *Ib.* 294.
3. *Same; election.*—When a party has a right to elect whether he will ratify or disaffirm a wrongful payment, he must either ratify or disaffirm it as an entirety: he can not, while suing the original debtor, maintain an action against the person to whom the money was paid, or fasten a trust on the property received by him in payment; though, if the property was merely received as collateral security for the debt, he may pursue it in equity, and at the same time maintain an action at law against the debtor. *Ib.* 294.
4. *Application of payments.*—When a debtor owes several distinct debts to one creditor, and makes a general payment, not directing how it shall be applied, the creditor may apply it as he pleases, and notice of the application to the debtor is not necessary; but the creditor must exercise this right *ante litem motam*, or before any controversy about it has arisen. *Johanson v. Thomas*, 367.
5. *Same.*—When an application of the payment has been once rightfully made, it can not be changed without the consent of both parties; and when it is made by the creditor, he having the right of election, it becomes irrevocable by him alone when he communicates the fact to the debtor. *Ib.* 367.
6. *Application of proceeds of sale of mortgaged property.*—When mortgaged property is sold under the mortgage, the mortgagee must apply the proceeds of sale to the payment of the mortgage debt, without any special directions from the mortgagor; and he can not apply the money to another debt, without the consent of the mortgagor. *Ib.* 367.
7. *Payment of judgment to justice.*—The payment of the judgment by the defendant to the justice of the peace, without an acceptance of the money by the plaintiff, does not bar the plaintiff's right to sue out an appeal or certiorari. *Grantham v. Payne*, 384.

PERJURY. ·See CRIMINAL LAW, 77.

PLEADING AND PRACTICE.

1. *When wife may sue on note, payable to husband.*—A promissory note, given for the purchase-money of lands belonging to the statutory estate of the wife, though payable to the husband, is a part of the

PLEADING AND PRACTICE—*Continued.*

corpus of her estate; and she may maintain an action on it in her own name, without any assignment or transfer by the husband. *Grantham v. Payne*, 584.

2. *Assignment of policy; when assignee may sue in his own name.*
When a policy of insurance is assigned pursuant to its terms, the assignee may maintain an action on it in his own name, in the event of a loss (Code, § 2890); but, where a policy is taken out by the mortgagor in his own name, the addition of the words, "Loss, if any, payable to J. F., to the extent of his mortgage interest," is a mere appointment of a part of the money, and does not constitute an assignment; nor does it authorize said J. F. to maintain an action on the policy in his own name, though the partial loss does not exceed the amount due on his mortgage. *Fire Insurance Companies v. Felrath*, 194.
3. *Who is proper party plaintiff; amendment by striking out parties.*
A statutory action in the nature of ejectment must be brought in the name of the person who holds the legal title; and if he is described in the summons and complaint as suing for the use of another person, these words may be struck out, by amendment (Code, § 3156), as surplusage. *Caldwell v. Smith*, 157.
4. *Plaintiff's right to sue; when and how questioned.*—When the trial was had on the merits, without objection to the plaintiff's right to sue as trustee, his right to maintain the action in that capacity can not be raised for the first time in this court. *Ala. Gold Life Ins. Co. v. Garner*, 210.
5. *Complaint; assignment of breaches.*—An averment in the complaint, as breach of the contract, that the company has failed and refused to pay plaintiff the stipulated compensation, is not a sufficient assignment, without an additional averment of sales made and their amount; and an averment that the company, after plaintiff had begun to introduce and sell its oils in Georgia under the contract, sent another agent there for that purpose, without the knowledge or consent of plaintiff, is not a sufficient assignment of a breach, without an additional averment that plaintiff was still performing his duties under the contract when the agent was so sent. *Union Refining Co. v. Barton*, 148.
6. *Complaint; averment of time and place.*—In an action against a railroad company, to recover damages for injuries to stock, whether commenced before a justice of the peace or in the Circuit Court, the complaint must specify "the time when, and the place where the killing or injury occurred" (Code, § 1711); and it is not sufficient, on demurrer, to state only the month and county. *Railroad Co. v. Carloss*, 443.
7. *Averment of negligence.*—If the complaint alleges that three of the plaintiff's cattle, particularly describing them, "were killed, and the other was injured or damaged to the value of ten dollars, by the negligence of the defendant in running a train of cars and locomotives on said railroad, and thus became wholly lost to plaintiff;" this is a sufficient averment that the injury was caused by the negligence of the defendant. *Ib.* 443.
8. *Amendment of complaint, on appeal from justice's court.*—When a cause is removed from a justice's court into the Circuit Court, either by appeal or by *certiorara*, it is triable *de novo*, without regard to any defect in the proceedings (Code, § 3121); and a trial may be there had on the original complaint, which may be amended, or a new complaint may be filed. *Littleton v. Clayton*, 571.
9. *Same.*—If the original complaint, as filed in the justice's court, was for forcible entry and detainer, a complaint for unlawful detainer may be filed in the Circuit Court. *Ib.* 571.

PLEADING AND PRACTICE—*Continued.*

10. *Pleadings construed against pleader.*—Pleadings must be reasonably certain, and when assailed by demurrer, if susceptible of more than one construction, that construction must be adopted which is least favorable to the pleader. *Jones v. McPhillips*, 314.
11. *Plea of tender by mortgagor, to purchaser at mortgage sale.*—A plea of tender, not accompanied with the payment of the money to the clerk of the court, is demurrable (Code, § 2997); and this provision applies to a plea of tender interposed by the mortgagor in defense of an action by the purchaser at a sale under the mortgage, although it is declared by another statute (§ 2879) that the tender "has the effect to re-invest him with the title." *Caldwell v. Smith*, 157.
12. *Statute of frauds; how pleaded.*—The statute of frauds as a defense, if not specially pleaded, is waived, and is not available under the general issue. *Martin v. Blanchett*, 288.
13. *Alteration of note; special plea averring.*—In an action on a promissory note, a special plea of *non est factum* being interposed, averring a material alteration in the date, proof of the signature is not necessary to the admission of the instrument as evidence; if there is a suspicious alteration on its face, the *onus* is on the plaintiff to explain it: but, if not, the *onus* is on the defendant to show that it has been altered. *Barclift v. Treece*, 528.
14. *Abandonment of special plea.*—When a demurrer to a special plea is overruled, and a demurrer to a replication thereto is sustained, while the bill of exceptions, purporting to set out all the evidence, shows that no evidence was introduced as to the issue thus presented, this court will consider the defense as abandoned, and will not revise the rulings on demurrer. *Clements v. Railroad Co.*, 533.
15. *Argument of counsel.*—Under the rule established by the former decisions of this court, counsel transgress the bounds of legitimate argument, in addressing remarks to the jury about matters which are not in evidence before them: and the presiding judge has ample power to check argument of this character. *Railroad Co. v. Carloss*, 443.

POWERS.

1. *When discretionary, and when imperative.*—A power is discretionary when it is not imperative, or, if imperative, when the time, manner or extent of its execution is left to the discretion of the trustee; and the courts will not, generally, compel the execution of a power which is discretionary, nor review an exercise of the discretion made in good faith; but, when the uses created are imperative, a power of sale conferred for their execution is equally imperative, when its exercise becomes necessary for their consummation. *Gosson v. Ladd*, 224.
2. *Execution of power.*—The intention to execute a power must be manifested, either expressly, or by clear implication; but it may be manifested by an express reference to the instrument creating the power, or, without such reference, by a reference to the property which is the subject of the power; and where the act would be inoperative except as an execution of the power, and is not reasonably susceptible of any other construction, it will be referred to the power. *Ib.* 224.
3. *Same.*—A deed executed by the trustee in this case, both individually and as trustee, and in which the life-tenants joined, held to be an execution of the power of sale conferred by the instrument creating the trust; it appearing that the trustee had purchased an interest in the property for the benefit of the trust estate, at a sale made by the register in chancery, and that the sale was confirmed

POWERS—*Continued.*

to him as trustee, although the register's deed was made to him individually. *Ib.* 224.

4. *Same; presumption arising from lapse of time.*—After the lapse of thirty years (in this case), and uninterrupted possession by the purchaser, the court will make all reasonable presumptions in favor of a due execution of a power of sale, and of the regularity and validity of the conveyance to him, which is not set out, but is described as "sufficient in law to pass the estate and title of the grantors." *Ib.* 224.
5. *Powers of trustees appointed by court.*—In the exercise of its jurisdiction over trustees, their appointment and removal, a court of equity may invest its appointees with all the powers requisite for the discharge of the duties of the trust; but it can not confer upon them powers merely discretionary, or powers resting on personal trust and confidence, unless such powers are attached to the office of trustee, or are conferred by the instrument creating the trust on the acting trustee. *Ib.* 224.
6. *Will construed as conferring personal trusts on executors, which can not be exercised by one only.*—Where the testator devised his entire estate, real and personal, to his two executors as trustees, authorizing them to continue his mercantile business, at their discretion, for the benefit of his estate, with power to sell, buy, or re-invest, and to manage the business "upon their judgments, without any order of court," but after consultation with his widow; the income and profits, after payment of his debts, to be used for the support and maintenance of his widow and child or children as a family during her life, and on her death the property to vest absolutely in the children; *held*, that the will created personal trusts, which could not be executed by the sole executor who qualified. *Werborn v. Austin*, 381.

PUBLIC LANDS.

1. *Judicial notice of, and exemption from taxation.*—The court judicially knows that all the lands in this State originally belonged to the United States, and were not subject to taxation until sold. *Bonner v. Phillips*, 427.
2. *Title of patentee, as against adverse possessor and purchaser at tax-sale.*—Where the plaintiff claims title under a patent issued to him within three years before the commencement of the action, and there is no evidence of any prior claim or act of ownership by any person claiming under the United States, the defendant can not defeat a recovery by setting up his adverse possession, or his purchase at tax-sale, prior to the date of plaintiff's patent. *Ib.* 427.
3. *Certificate of register of land-office.*—A certificate made by the register of the land-office at Montgomery, which simply states that "*the records of said land-office show that, on August 11th, 1855, Sarah Presnall entered at St. Stephens, Alabama,*" a tract of land particularly described, is the mere statement of a conclusion by the officer, not a certificate issued under authority of any act of Congress (Code, § 3043), and is not competent evidence for any purpose. *Ib.* 427.
4. *Railroad lands; exemption from taxation "for the term of eight years from May 1st, 1876;" when term begins.*—Under the provisions of the act approved February 23d, 1876, known as the "Debt Settlement Act" (Sess. Acts 1875-6, p. 130), certain lands granted by Congress to aid in the construction of railroads, and afterwards acquired by the State under mortgages to secure its indorsement of railroad bonds, were to be disposed of, to the said railroads, or for their benefit; and it was declared that "the lands which may

PUBLIC LANDS—*Continued.*

be acquired by the holders of the bonds mentioned in the 15th section of this act, or by the trustees hereinafter provided for the use of said bondholders under the terms of this act, shall remain exempt from taxation by this State, *for the term of eight years from the first day of May, 1876.*" Held, that as the lands were not subject to taxation from January 1st to May 1st, 1876, while they were the property of the State, and as no provision was made by law for taxing lands acquired after January 1st, the year 1876 was not to be computed as one of the eight years during which the lands were exempt from taxation, but the term commenced with the year 1877. *Swann & Billups v. The State, 545.*

PUBLIC ROADS.

1. *Exemption from duty to work public road; employee of Alabama Insane Hospital.*—A person can not claim exemption from the duty of working on the public roads (Sess. Acts 1876-7, p. 135), on the ground that he is an employee of the Alabama Insane Hospital (Code, § 1500), when he does not show that he was engaged in that capacity at the time he was notified or summoned to work on the road. *Lewin v. The State, 45.*
2. *Same; members of incorporated fire-company.*—An active member of an incorporated fire-company, whose charter exempts its members "from military duty, road-tax, and performance of jury duty," is exempt from the statutory duty of working the public roads; the word "road-tax" being construed to mean road-duty, since otherwise it would have no field of operation. *Ib. 45.*

RAILROADS.

1. *Subscription for stock procured by fraud of agent.*—A subscription to the stock of an incorporated railroad company, procured by the fraud of the company's agent soliciting subscriptions, may be defeated on the plea of fraud, when the company attempts to enforce it by suit. *Montgomery Southern R. R. Co. v. Matthews, 357.*
2. *False representations by agent, as to location and completion of road.* Representations by the agent of a railroad corporation, soliciting subscriptions for stock from persons living along the contemplated route of the road, as to its intended location, and the time within which it will be completed to a particular place, are but the mere expression of an opinion, and neither constitute a fraud, nor are available as a defense to an action on a subscription for stock made on the faith of them, unless known by the agent to be false, and made by him with intent to deceive. *Ib. 357.*
3. *Same; injunction against enforcement of subscription.*—Although an action on the defendant's subscription for stock can not be defeated on the ground of fraud, when the representations of the corporation's soliciting agent were merely the expression of an opinion as to the probable location and completion of the road; yet, if the agent further represented that the money subscribed would be refunded unless the road was so located and completed, and he was authorized to make these representations, the action will, *it seems*, be enjoined in equity, on proof of the insolvency of the corporation and its abandonment of the work before completion. *Ib. 357.*
4. *Duty of railroad company to protect passengers against violence and misconduct.*—Although it is the duty of a railroad company, as a common carrier, to protect its passengers, and especially female passengers, against violence or disorderly conduct on the part of its own agents and servants, other passengers, and strangers, when such violence or misconduct may be reasonably anticipated and

RAILROADS—*Continued.*

prevented; yet it is not liable to an action for damages at the suit of a female passenger, on account of obscene and profane language, indecent exposure of the person, and other disorderly conduct by two or three intruders, who came into the waiting room at the station while plaintiff was awaiting the arrival of her train, when it is not shown that the company had notice of any facts which justified the expectation of such an outrage. *Batton v. S. & N. Ala. Railroad Co.*, 591.

5. *Duty of railroads to provide privy accommodations.*—By statute enacted since the occurrence of the injury in this case, it is made the duty of railroad companies to provide privy accommodations at depots and stations, when required to do so by the Railroad Commission (Sess. Acts 1882-3, p. 154); and this may be regarded as "a legislative intimation that, theretofore, the duty was at least doubtful." *M. & E. Railway Co. v. Thompson*, 448.
6. *Liabilities for injuries caused by traps or pitfalls.*—All the property of a railroad company, including its depots and adjacent yards and grounds, is its private property, on which no one is invited, or can claim a right to enter, except those persons who have business with the railroad; which class embraces, not only passengers, but protectors and friends attendant on their departure, or awaiting their arrival. To the class of persons thus having business, the railroad company is under obligation to keep in safe condition all parts of its platforms, with the approaches thereto, to which the public do, or would naturally resort, and all portions of the station-grounds reasonably near to the platform, where passengers would be likely to go, and to provide safe waiting-rooms, and to keep the depot and platform well lighted at night; but, to the public at large, the company owes "nothing beyond the observance of the duties of good neighborhood," which includes "the universal duty of doing no willful or wanton injury, and of not erecting or continuing, on or near its platform or approaches, to which the public may be expected to go, any nuisance, trap, or pitfall, from which personal injury is likely to ensue." *Ib.* 448.
7. *Liability of owners and lessees of railroad.*—The building in the city of Montgomery known as the "Union Depot," with the yard or grounds annexed, is the property of the two railroad companies known as the South and North Alabama, and the Louisville and Nashville; but the Montgomery and Eufaula railroad company, having acquired by lease, at a stipulated rent, the right to use the property in common with them, for the arrival and departure of its trains, with the use of its waiting rooms, ticket-offices, baggage-room, &c., is liable to passengers and the public generally, in relation to the property, as if it were the owner in fee. *Ib.* 448.
8. *Contributory negligence as defense.*—To an action against a railroad company, to recover damages on account of personal injuries sustained from a neglect of this duty [to keep its depot grounds and approaches in safe condition], contributory negligence on the part of the plaintiff himself is a complete defense. *Ib.* 448.
9. *Application of these principles to case at bar.*—The plaintiff in this case came to Montgomery on the Montgomery and Eufaula railroad, and, on alighting from the train at the Union Depot, desiring to find a privy, made inquiry of a stranger, who pointed in the direction of a privy erected on the bank of the river, at the further end of the platform, about fifty yards from the depot; and in trying to find it, he wandered beyond it in the dark, fell down the steep bluff, and sustained serious injuries. The railroad platform was well lighted, and extended from the depot to the river; but there was no light at the privy, and a house intervened between it and the lights on the platform. *Held*, on these facts, that the

RAILROADS—Continued.

plaintiff had no cause of action against the railroad companies who owned the property, as to them being a mere stranger; and that he could not recover against the Montgomery and Eufaula corporation, lessees of the property, because, being acquainted with the locality, he was guilty of contributory negligence in attempting to find the privy without further inquiry. *Ib.* 448.

10. *Liability of railroad company, for injuries to stock; statutory provisions.*—The statutory provisions prescribing certain duties to be performed by railroad engineers "on perceiving an obstruction on the track of the road," making the railroad company liable for all damages to persons, stock or other property, resulting from a failure to comply with these requirements, and imposing on it, in an action for damages, the *onus* of proving compliance (Code, §§ 1699, 1700), only apply when there is an obstruction on the track of the road, against which the engine or train, running its proper course and direction, may strike, and it is perceived by the engineer; nor do the statutory duty and liability arise, when an animal suddenly springs on the track in front of the engine, in such close proximity that human appliances can not avoid a collision. *Railroad Co. v. Bayliss*, 429.
11. *Same, at common law.*—As to an animal running by the side of the track, though on the railroad's right of way, the duties of the engineer and the liability of the company for damages are to be determined by the principles of the common law, which require that the engineer should use the same care and diligence which a careful and prudent man, handling agencies of similar hazard and power, would use in the management of his own business; and the rule is the same, whether the animal is seen by the engineer, or is not seen because of his failure to observe proper watchfulness, so far as consistent with the performance of other duties equally imperative. *Ib.* 429.
12. *Same; burden of proof.*—The liability of a railroad company for damages resulting from a failure to comply with statutory requirements, or from other negligence, whether to persons, or to stock or other property, is the same (Code, §§ 1699, 1700); but, where the injury is to stock or other property, the *onus* of showing a compliance with the statutory requirements is imposed on the railroad company, and without this proof it does not relieve itself of the imputation of negligence; but the statute does not extend this rule to actions for personal injuries. *Clements v. Railroad Co.*, 533.
13. *Contributory negligence as defense.*—The court does not assent to the proposition, that contributory negligence on the part of the plaintiff, though proximate, is no defense to the action, if the railroad company was guilty of negligence, or omission of duty, which aided in bringing about the injury. *Ib.* 533.
14. *Action for damages; averment of time and place.*—In an action against a railroad company, to recover damages for injuries to stock, whether commenced before a justice of the peace or in the Circuit Court, the complaint must specify "the time when, and the place where the killing or injury occurred" (Code, § 1711); and it is not sufficient, on demurrer, to state only the month and county. *Railroad Co. v. Carlos*, 443.
15. *Same; averment of negligence.*—If the complaint alleges that three of the plaintiff's cattle, particularly describing them, "were killed, and the other was injured or damaged to the value of ten dollars, by the negligence of the defendant in running a train of cars and locomotives on said railroad, and thus became wholly lost to plaintiff;" this is a sufficient averment that the injury was caused by the negligence of the defendant. *Ib.* 443.

RAILROADS—*Continued.*

16. *Same; variance.*—When the injury is alleged to have occurred on the 21st day of the month, and the evidence shows that it occurred on the first day, the variance is fatal, and the evidence should be excluded. *Ib.* 443.
17. *Railroad lands; exemption from taxation* “for the term of eight years from May 1st, 1876;” when term begins.—Under the provisions of the act approved February 23d, 1876, known as the “Debt Settlement Act” (Sess. Acts 1875-6, p. 130), certain lands granted by Congress to aid in the construction of railroads, and afterwards acquired by the State under mortgages to secure its indorsement of railroad bonds, were to be disposed of, to the said railroads, or for their benefit; and it was declared that “the lands which may be acquired by the holders of the bonds mentioned in the 15th section of this act, or by the trustees hereinafter provided for the use of said bondholders under the terms of this act, shall remain exempt from taxation by this State, for the term of eight years from the first day of May, 1876.” Held, that as the lands were not subject to taxation from January 1st to May 1st, 1876, while they were the property of the State, and as no provision was made by law for taxing lands acquired after January 1st, the year 1876 was not to be computed as one of the eight years during which the lands were exempt from taxation, but the term commenced with the year 1877. *Swann & Billups v. The State*, 545.

REDEMPTION OF REAL ESTATE.

1. *Plea of tender by mortgagor, to purchaser at mortgage sale.*—A plea of tender, not accompanied with the payment of the money to the clerk of the court, is demurrable (Code, § 2997); and this provision applies to a plea of tender interposed by the mortgagor in defense of an action by the purchaser at a sale under the mortgage, although it is declared by another statute (§ 2879) that the tender “has the effect to re-invest him with the title.” *Caldwell v. Smith*, 157.
2. *Statutory right not extended in equity.*—The right of redemption, given by statute to judgment creditors (Code, §§ 2881-82), can not be extended by a court of equity to creditors by simple contract only, although their debts are ascertained and adjudged by the decree. *Seals v. Pfeiffer & Co.*, 278.
3. *Decree for sale of lands, “subject to mortgages.”*—In a suit by judgment creditors of the husband, seeking to set aside as fraudulent a conveyance of lands to the wife, and to subject the land by sale to the satisfaction of their judgments; subsequent mortgagees of the husband and wife having intervened, asserting their rights, and claiming protection as purchasers for valuable consideration without notice; held, that a decree in favor of the complainants, ordering the lands to be sold “subject to the said mortgages,” was a recognition and determination of the validity of the mortgages, and estopped the complainants from assailing their validity, in a subsequent suit seeking to redeem from the purchasers at the sale under the decree, who afterwards succeeded by purchase to the rights of the mortgagees. *Holden v. Rison & Co.*, 515.
4. *What are “lawful charges;” sale under power in mortgage.*—If, in such case, the mortgages had not been foreclosed, at the time the decree ordering the sale was rendered, by a sale under the powers therein contained, their validity being thus recognized by the decree, they constituted a “lawful charge” on the property, which the judgment creditors, seeking to redeem, were required to pay or tender; and if they had been thus foreclosed, whereby the equity of redemption was cut off, and only a

REDEMPTION OF REAL ESTATE—*Continued.*

statutory right of redemption remained in the mortgagor, the purchasers at the sale under the decree acquired nothing which could be redeemed by a judgment creditor. *Ib.* 515.

SET-OFF.

1. *In equity, against mortgage debt.*—When the mortgagee files a bill to foreclose, the mortgagor may set up any defense, except the statute of limitations, which would be available at law in an action on the debt; and hence he may, in extinguishment or reduction of the mortgage debt, set off any other debt or demand which would be available at law; but, when the bill is filed by the mortgagor himself, seeking to enjoin a sale of the property under a power in the mortgage, he must show some other ground for equitable interference, before he can establish as a set-off an independent debt or demand, for which he has an adequate remedy at law. *Knight v. Drane*, 371.

SPECIFIC PERFORMANCE. See CHANCERY, 33-37.

STATUTES.

1. *Statutes omitted from Code.*—The act approved March 4th, 1876, entitled "An act to allow married women in certain cases to sue in their own names" (Sess. Acts 1875-6, p. 159), having been omitted from the Code of 1876, thereby became inoperative. *Werborn v. Austin*, 331.
2. *Judicial knowledge.*—The court will take judicial notice of the act approved March 19th, 1875, known as the "Local Option Law" (Sess. Acts 1874-5, p. 276), and of the counties to which it is applicable; but not of an election held under its provisions in any one of those counties, nor the result thereof. *Grider v. Tally*, 422.
3. *Judicial notice of legislative journals.*—The courts take judicial notice of the journals kept by the two houses of the General Assembly, and are authorized to search them for the purpose of ascertaining whether a particular statute, included in the printed volume published by authority, was enacted in accordance with the forms prescribed by constitutional provision. *Moog v. Randolph*, 597; *Sayre v. Pollard*, 608.
4. *Variance between approved (or enrolled) and original bill.*—A material variance, in substance and legal effect, between the enrolled bill which was signed by the governor, and the bill which actually passed the General Assembly, as shown by the journals of the two houses, is fatal to the validity of the enactment as a law. *Ib.* 597, 608.
5. *Same; revenue law of Feb. 23d, 1883.*—The revenue law approved February 23d, 1883, as signed by the governor, imposed a tax on "all money loaned and solvent credits, or credits of value" (Sess. Acts 1882-3, p. 71, § 5, subd. 7), without any deduction of the taxpayer's indebtedness, while the bill which actually passed the two houses of the General Assembly, as shown by their journals, contained a clause expressly authorizing such deduction, and taxing the surplus only; and this variance destroys the validity of the entire enactment. (STONE, J., doubting.) *Moog v. Randolph*, 597.
6. *Same.*—In the act providing for the assessment and collection of taxes, and defining the duties of the officers engaged in the assessment and collection, approved February 23d, 1883, the 57th section, as approved by the governor, required the tax-collector to give notice of his appointments in each precinct, by publication in a newspaper, "or by bills posted at five or more public places," while said section of the bill passed by the General Assembly, as

STATUTES—Continued.

shown by the journals of the two houses, required notice by publication "and by bills posted," &c.; and this variance destroys the validity of the entire enactment. (STONE, J., doubting.) *Sayre v. Pollard*, 608.

SUBROGATION. See CHANCERY, 38-9.

TAXATION, AND TAXES.

1. *When tax-year begins.*—The tax-year, so far as relates to real estate, commences on the first day of January, and the tax-payer is required to include in his schedule of property the lands owned by him on that day. *Swann & Billups v. The State*, 545.
2. *Exemption of railroad lands from taxation* "for the term of eight years from May 1st, 1876;" *when term begins.*—Under the provisions of the act approved February 23d, 1876, known as the "Debt Settlement Act" (Sess. Acts 1875-6, p. 130), certain lands granted by Congress to aid in the construction of railroads, and afterwards acquired by the State under mortgages to secure its indorsement of railroad bonds, were to be disposed of, to the said railroads, or for their benefit; and it was declared that "the lands which may be acquired by the holders of the bonds mentioned in the 15th section of this act, or by the trustees hereinafter provided for the use of said bondholders under the terms of this act, shall remain exempt from taxation by this State, for the term of eight years from the first day of May, 1876. Held, that as the lands were not subject to taxation from January 1st to May 1st, 1876, while they were the property of the State, and as no provision was made by law for taxing lands acquired after January 1st, the year 1876 was not to be computed as one of the eight years during which the lands were exempt from taxation, but the term commenced with the year 1877. *Ib.* 545.
3. *Public lands; judicial notice of, and exemption from taxation.*—The court judicially knows that all the lands in this State originally belonged to the United States, and were not subject to taxation until sold. *Bonner v. Phillips*, 427.
4. *Same; title of patentee, as against adverse' possessor and purchaser at tax-sale.*—Where the plaintiff claims title under a patent issued to him within three years before the commencement of the action, and there is no evidence of any prior claim or act of ownership by any person claiming under the United States, the defendant can not defeat a recovery by setting up his adverse possession, or his purchase at tax-sale, prior to the date of plaintiff's patent. *Ib.* 427.

TENDER.

1. *In bill to redeem; when necessary or proper.* *Tatum Brothers v. Walker*, 563.
2. *In bill for specific performance; when necessary or proper.* *Carlisle v. Carlisle*, 339.
3. *By debtor asking to redeem; sufficiency of plea.* *Caldwell v. Smith*, 157.

TRESPASS.

1. *Actions against joint trespassers; discontinuance.*—A plaintiff may, at his election, maintain a separate action against each of several joint trespassers, or a joint action against all, though he can have but one satisfaction; and if he elects to bring a joint action, he may "sue out an *alias* summons, or discontinue as to those on whom the summons is not served, and proceed to judgment

TRESPASS—*Continued.*

against those on whom it has been executed" (Code, § 2911); but the statute does not authorize him to sue out an *alias* summons as to one not served, take a final judgment by default against another, and continue as to a third who appears and pleads; and by such judgment the entire cause is discontinued. *Slade v. Street*, 576.

2. *Malicious trespass on lands; constituents of offense.*—To justify a conviction against a person who "willfully and maliciously commits any trespass on the lands of another, by cutting down or destroying any wood or timber growing thereon" (Code, § 4417), something more than a mere willful trespass must be shown—the act must be willful and malicious; and while malice is not, ordinarily, the subject of positive proof, facts and circumstances must be shown from which it may be inferred that the act was prompted by ill-will, malevolence, grudge, spite, enmity, or wicked intention. *Pippen v. The State*, 81.
3. *Same.*—Where the evidence shows that the trees were cut by the defendant, by the direction of his employer (or his employer's wife, in his absence), who wanted rails to repair a fence, and who told him that he might sell the bark; that his employer owned a strip of the land, having bought from the prosecutor, and that the line between them had never been run, although the prosecutor had pointed out the line as he claimed it, and told defendant he must not cut any trees beyond it; these facts, without more, do not justify the inference of malice, and do not authorize a conviction. *Ib.* 81.

TRIAL OF RIGHT OF PROPERTY.

1. *Affidavit of claim.*—An affidavit of ownership by the claimant is the initial step in a statutory claim suit, without which the claimant has no standing in court, and his claim is properly dismissed. *Graham v. Hughes & Hughes*, 590.

TRUSTS, AND TRUSTEES.

1. *Naked trust; estate of joint grantees.*—Where the owner of lands conveys them by deed, in trust for himself and another person, imposing no duties whatever on the trustee, a dry, naked trust is created, and the legal title is vested in the beneficiaries (Code, § 2185); and in the absence of words creating a different estate, they hold as tenants in common. *Webb v. Crawford*, 440.
2. *Requiring bond of assignee, or trustee.*—A trustee, or assignee, in a deed of assignment for the benefit of creditors, though relieved from giving bond by the instrument itself, may be required to give bond by the beneficiaries of the deed (Code, § 3735); and when it appears that he has offered to give bond, and has done so under the order of the court, the fact that the assignment did not require a bond is no reason for removing him, at the instance of the creditors, and appointing a receiver of the property in his stead. *Jones v. McPhillips*, 314.
3. *Trusts for creditors; when equity will assume jurisdiction, at instance of beneficiaries.*—Courts of equity have original jurisdiction of trusts, and will enforce their execution at the instance of the beneficiaries; but, when a general assignment is made by an insolvent bank, for the benefit of its creditors, a court of equity will not at once assume jurisdiction, at the instance of some of the creditors, remove the assignee, and appoint a trustee or receiver in his stead, unless it is shown that the assignee is incompetent or unfit for his office, or that he has been guilty of some neglect or breach of duty. *Ib.* 314.

TRUSTS, AND TRUSTEES—*Continued.*

4. *Same.*—That the assignee is a young man, and has had but little business experience; that his property is inconsiderable when compared with the value of the property conveyed by the assignment, while he was not required to give bond; that he was a director of the bank at the time the assignment was made, and also during the period of the mismanagement of its affairs, which resulted in its insolvency, through excessive loans to its president against bitter opposition in the board of directors—these facts, as alleged, are not sufficient to justify his removal, at the instance of creditors, and the appointment of a receiver in his stead, when it does not appear that he participated in the alleged mismanagement, or voted with the majority in favor of the excessive loans to the president; and when it does appear that he has already offered to give, and has given bond for the faithful performance of his duties. *Ib.* 314.
5. *Powers of trustees appointed by court.*—In the exercise of its jurisdiction over trustees, their appointment and removal, a court of equity may invest its appointees with all the powers requisite for the discharge of the duties of the trust; but it can not confer upon them powers merely discretionary, or powers resting on personal trust and confidence, unless such powers are attached to the office of trustee, or are conferred by the instrument creating the trust on the acting trustee. *Gosson v. Ladd*, 224.
6. *Trusts created by deed, for benefit of third persons; whether naked, or active; duration of trust estate.*—An assurance declaring a use, trust, or confidence in land, for the mere benefit of third persons, the trustee being the repository of a naked legal title, having no duties to perform, and subject to no accountability, vests the legal estate in the beneficiaries as if the conveyance were made directly to them (Code, § 2185); but, when a use is declared, or successive uses, which impose active duties on the trustee, in the control, management, or disposition of the property, a legal estate is vested in him commensurate with the scope and extent of the uses or trusts; which estate continues so long as there are any active duties to be performed, or any office in respect to the property to be fulfilled, and ceases with them when the purposes of the trust have been fully accomplished. *Ib.* 224.
7. *Trust deed construed, as to estate of trustee, its duration and termination.*—A deed by which the grantor covenanted to stand seized of certain property, real and personal, for uses and purposes as follows: 1st, the payment of all his debts and liabilities then existing; 2d, the joint use of himself and his wife, during their joint lives; one undivided half to be at all times at his sole disposal, and, on the death of his wife, one half of what then remained to be divided as follows—specified sums of money and slaves to be retained and held by him in trust for three grand-children of his wife, children of her three children by a former husband, and the residue of the one half, or its proceeds, to be divided equally among the three children, the interest, or use thereof only, to belong to them during their lives, and at their death to be divided among their children then living,—vests in him the legal title and sole use of one half of the estate, and the primary use of the whole for the payment of his debts; but, after his debts were paid, his active duties as trustee continued only during the lives of the children, who had an equitable life-estate; and on the death of two of the children, after the death of the wife, the trust ceased, and the legal estate in the shares of the deceased children then vested in their respective children, unless the remainder was cut off by a sale pursuant to the terms of the deed. *Ib.* 224.
8. *Deed construed, as to power of sale conferred on trustee.*—In a deed

TRUSTS, AND TRUSTEES—*Continued.*

by which the grantor covenants to stand seized of certain property, real and personal, for certain declared uses and purposes (namely, the payment of his debts, the joint use of himself and his wife during life, with further provisions for her children and grand-children), a power of sale in these words: "And the said John P. N. shall at all times have the sole and absolute right to sell and dispose of the estate hereby conveyed to the uses aforesaid, and on giving adequate security to invest the proceeds according to the terms of this deed,"—does not repose on personal trust and confidence, but is attached to the office of trustee, and intended for the benefit of the trust estate; and it may be exercised by a subsequent trustee, appointed by a court of equity. *Ib.* 224.

9. *Executor and trustee acting without authority; bill for account and settlement.*—When a sole acting executor undertakes the management of the estate, and the execution of the personal trusts created and conferred by the will on both of the persons named as executors, although he acts without authority, he renders himself liable as a trustee; and he may be required to account in equity at the suit of the remainder-man. *Werborn v. Austin*, 381.
10. *Trust funds; when followed into hands of third persons.*—Trust funds may be followed into the hands of a third person, so long as they can be satisfactorily traced and identified, although he has taken the title to the property purchased with them in his own name; but, to authorize this relief, the facts must be averred with distinctness and precision, and must be proved by full, clear, and convincing evidence. *McCall v. Rogers*, 349.
11. *Protection to mortgagee, as bona fide purchaser.*—A mortgagee of property purchased with trust funds, if he had no notice of that fact, and is a *bona fide* purchaser for value, is entitled to protection against the implied trust arising from such investment of the trust funds; but, if the debt secured by the mortgage is tainted with usury, he is not a *bona fide* purchaser for valuable consideration. *Ib.* 349.

USURY.

1. *In mortgage; stipulations construed.*—A provision in a mortgage for the payment of \$2,500 within thirty days, "and securing to be paid" in installments, "as hereinafter stated, all debts that may at the time be due to said party of the second part from the party of the first part, with the interest thereon, and all reasonable costs, charges, fees and expenses," does not, *per se*, render the mortgage usurious; the stipulation being susceptible of the construction, that the \$2,500 was to be a partial payment on the debt, and not as a *bonus* in addition to it. *Rapier v. Gulf City Paper Co.*, 126.
2. *Same.*—The mortgaged property consisting of a newspaper office, with job-printing office attached, which had been conducted at a loss by the mortgagors, the mortgage is not rendered usurious by a stipulation that the mortgagee shall not be liable "for any profit or revenue he may derive from the use of the property." *Ib.* 126.

VENDOR AND PURCHASER.

1. *Vendor's lien; when mortgagee may claim protection against, as purchaser without notice.*—When the heirs and distributees of an intestate's estate voluntarily make an agreement among themselves for a division of the lands, each executing to the administratrix his note for the agreed value of the land allotted to him, to be paid and adjusted on final settlement of the estate, liens being retained

VENDOR AND PURCHASER—*Continued.*

and declared on each one's portion for his indebtedness; although the agreement is not recorded, the administratrix may enforce a vendor's lien against one portion of the land, as against a mortgagee of the heir to whom it was allotted, to the extent of the interest acquired by him under the agreement; but, as to the interest therein inherited by the mortgagor, the mortgagee may claim protection as a purchaser without notice, if he is also a purchaser for value. *Jones & DePras v. Robinson*, 499.

2. *Same; when mortgagee is purchaser for value.*—A mortgage, when given only to secure an antecedent debt, does not entitle the mortgagee to protection in equity as a purchaser for valuable consideration; but, when given to secure a debt contemporaneously contracted, or in consideration of the extension of an antecedent debt, this makes a valuable consideration, and entitles the mortgagee to such protection. *Ib.* 499.
3. *Protection to mortgagee, as bona fide purchaser.*—A mortgagee of property purchased with trust funds, if he had notice of that fact, and is a *bona fide* purchaser for value, is entitled to protection against the implied trust arising from such investment of the trust funds; but, if the debt secured by the mortgage is tainted with usury, he is not a *bona fide* purchaser for valuable consideration. *McCall v. Rogers*, 349.
4. *Same; when not entitled to protection as purchaser without notice.* If, in such case, the lands assigned to the husband, by the deed of partition, are afterwards mortgaged by him and his wife, as security for his debt, the mortgagee can not claim protection as a *bona fide* purchaser without notice, on account of the recitals of the deed of partition, but is charged with notice of all the facts shown by the records of the Probate Court, relative to the purchase by the wife at an administrator's sale, which is mentioned in the deed. *Harden v. Darwin & Pulley*, 472.
5. *Admission as to notice by purchaser.*—When lands are subject to an easement or restricted use under a conveyance from a remote vendor, a sub-purchaser who admits in his answer that, before his purchase, "he was informed of the existence of some such obligation," is chargeable with notice of all facts relating to the nature, character and extent of the obligation or restriction, which he might have ascertained by due inquiry from the persons claiming the benefit of it. *Webb v. Robbins*, 176.
6. *When title passes to purchaser of goods; delivery to common carrier.* When a purchaser of goods, having previously ordered them, requests the seller to deliver them to some specified carrier for him, a delivery to that carrier is equivalent to a delivery to the purchaser himself; but, when the seller, on delivering the goods to a carrier for transportation, takes the bill of lading in his own name, the title is retained in himself, and does not pass without an assignment of the bill of lading. *McCormick & Richardson v. Joseph & Anderson*, 236.
7. *Same; assignment and delivery of bill of lading, or deposit in mail.* If the seller takes the bill of lading in his own name, and afterwards transfers and delivers it to the purchaser, the title to the goods thereby passes to and vests in the purchaser; and if he deposits it in the mail, assigned and directed to the purchaser, the delivery takes effect from that day, notwithstanding the miscarriage and loss of the paper; nor is a duplicate necessary to perfect the title of the purchaser in such case. *Ib.* 236.
8. *Fraudulent purchase of goods; right of seller.*—When an insolvent purchaser obtains goods by misrepresentation, or by fraudulent concealment, having at the time no intention to pay for them, the seller may disaffirm the sale, and reclaim the goods, as against the

VENDOR AND PURCHASER—*Continued.*

- fraudulent purchaser, or any one claiming under him with notice of the fraud. *Ib.* 236; *Spira v. Hornthall & Co.*, 137.
9. *Same*; *sub-purchase for value, without notice; innocent sufferers by wrongful act of third person.*—If the goods have passed into the hands of a sub-purchaser for valuable consideration, without notice of the fraud, his right is superior to that of the original vendor, and the latter can not recover the goods from him; the principle applying as between them, that where one of two innocent persons must suffer by the wrongful act of a third person, the loss must fall on him who put it in the power of that person to perpetrate the wrong; and a remote sub-purchaser is equally entitled to protection against the claim of the vendor, when either he or any one of the intermediate purchasers acquired the goods for valuable consideration without notice. *Ib.* 137.
 10. *Same*; *who is purchaser for value.*—Merely agreeing to take the goods in payment of an indebtedness past-due, and entering a credit on the account for the price, without surrendering anything valuable, does not entitle the creditor to protection as a purchaser for valuable consideration; *see* *us*, if he takes them in absolute payment and satisfaction, and surrenders the evidence or securities of his debt. *Ib.* 137.
 11. *Same*; *burden of proof as to notice.*—When the vendor has proved that the goods were obtained from him by the fraud of the purchaser, it is incumbent on the sub-purchaser, claiming protection against the rights of the vendor, to show that he paid value for them; but, when he has done this, the *onus* is on the vendor to prove that he had notice of the fraud. *Ib.* 137.

WILLS.

1. *Probate of wills; jurisdiction of Probate Courts.*—In the probate of wills, as well as the grant of letters testamentary or of administration, the Probate Court not only has exclusive jurisdiction, but possesses all the powers and attributes of a court of general jurisdiction; and every intendment will be indulged in favor of its rightful exercise of the jurisdiction, while nothing will be presumed against the regularity and legality of its action. *Acklen v. Goodman*, 521.
2. *Same*; *transcript of record.*—A transcript from the records of the Probate Court, which contains only a copy of the will, and an affidavit of the subscribing witnesses, made before the judge of probate, as to its due execution, not followed by any order, decree or judgment of the court, does not show a probate of the will. *Ib.* 521.
3. *Same*; *notice of application for probate; appointment of guardian ad litem for infants; trial by jury, of contest.*—When the probate of a will, or of parts only of the paper purporting to be a will, is collaterally attacked, it is not necessary that the record shall affirmatively show notice of the application, the appointment of a guardian *ad litem* for the infants, or the summoning or waiver of a jury; in the absence of averment and proof to the contrary, the proceedings in these several matters will be presumed to have been regular. *Ib.* 521.
4. *Will construed as conferring personal trusts on executors, which can not be exercised by one only.*—Where the testator devised his entire estate, real and personal, to his two executors as trustees, authorizing them to continue his mercantile business, at their discretion, for the benefit of his estate, with power to sell, buy or reinvest, and to manage the business, "upon their judgments, without any order of court," but after consultation with his widow;

WILLS—*Continued.*

the income and profits, after payment of his debts, to be used for the support and maintenance of his widow and child or children as a family during her life, and on her death the property to vest absolutely in the children; *held*, that the will created personal trusts, which could not be executed by the sole executor who qualified. *Werborn v. Austin*, 381.

WITNESS.

1. *Experts, as witnesses.*—Whether a witness possesses the necessary qualifications to testify as an expert, is a preliminary question addressed to the court, and much must be left to its discretion; and if the witness be competent as an expert, he may state his opinion, and detail generally the facts on which it is based. *Tesney v. The State*, 33.
2. *Refreshing memory of witness by memorandum.*—While a witness must testify to facts within his knowledge, he may, during his examination, assist or refresh his memory, by referring to an entry or memorandum made at or near the time when the facts occurred, whether made by himself or another person, if he knows it to be correct, and can, after referring to it, testify from independent recollection; and it is not necessary to show that the witness needs the memorandum to assist his memory. *Calloway v. Varner*, 541.
3. *Same.*—The memorandum so referred to by the witness is not thereby made evidence, nor its contents disclosed to the jury, unless called for by the opposite party; and it is immaterial whether it be the original memorandum, or a copy thereof known by the witness to be correct; but, when a copy is used, and the original, being called for, is not produced, the failure to produce it, or to explain satisfactorily the reasons for using a copy, is a circumstance to be considered by the jury in weighing the testimony of the witness. *Ib.* 541.
4. *Transactions with, or statements by decedent; who may testify as to.* On the final settlement of the accounts of a deceased administrator, between his personal representative and the administrator *de bonis non*, an heir or distributee of the intestate's estate, being presumptively interested in the result of the proceeding, is incompetent to testify as to any transaction with, or statement by the deceased administrator, in connection with the assets of the estate (Code, § 3058), unless called to testify by the opposite party. *McDonald v. Jacobs*, 524.
5. *To what witness may testify.*—A witness can not be asked, nor can he be allowed to state, his "reasons for believing" any fact. *Ib.* 524.
6. *Same.*—The seller of goods, testifying as a witness for himself, in a controversy with a sub-purchaser, can not be allowed to state that "he believed the purchaser to be solvent, and would not have sold the goods if he had known of his insolvency," nor that "from general report, he understood" the purchaser was solvent. *McCormick & Richardson v. Joseph & Anderson*, 236.
7. *Proof of foot-prints.*—A witness who measured tracks found at the place where the offense was committed, and compared them with tracks made by the defendant on the next day, may state that they "corresponded;" but he can not be asked whether a particular shoe, which he had seen on defendant's foot, "would have made" such a track as that found at the place. *Busby v. The State*, 66.
8. *Proof of mistake; to what witness may testify.*—A witness who knows that a mistake was made, and by whom made, may state those facts; but, when it is neither proved nor admitted that a mistake was in fact made, a witness can not be allowed to state, "If any mistake was made, it must have been made by me," this being

WITNESS—*Continued.*

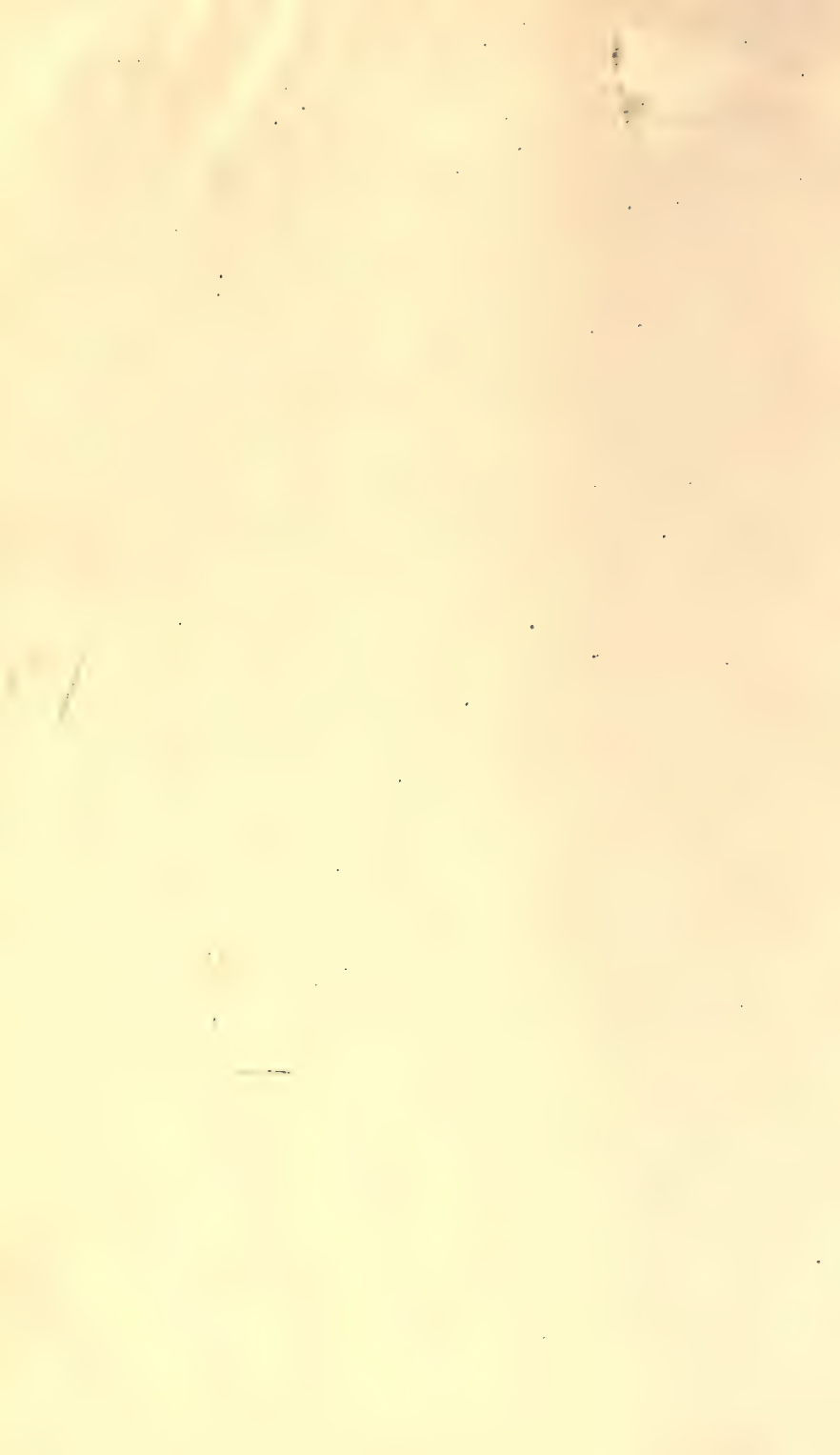
- merely the expression of his opinion as to a conclusion of fact to be drawn by the jury. *Insurance Co. v. Garner*, 210.
9. *What witness may state.*—A witness who testifies that, while looking for his own cattle, he saw plaintiff's stock near the railroad as he passed, and, on returning an hour and a half afterwards, saw them again just as a train moved off, after stopping, at the place where the cattle were injured, may further state, that, if any other train had passed during the intervening time, he could have heard it, and that no other train did pass. *Railroad Co. v. Carloss*, 443.
 10. *Same.*—A witness who was present at the rencounter between the defendants and the deceased, and who testifies that he did not hear the deceased curse or swear as he rode up to the place where the others were, as another witness testified he had done, may further state that he was in such position at the time that, if the words had been used, he could have heard them; being subject to cross-examination as to the particular facts, which would show to what weight his testimony was entitled. *Tesney v. The State*, 33.
 11. *Impeaching witness; charge as to witness not being impeached.*—One mode of impeaching a witness is to disprove by other witnesses the facts stated by him; and hence, a charge asked, asserting that "there has been no attempt to impeach the veracity of the witness," is properly refused, when there is any other evidence from which a contradiction of his testimony can be inferred. *Railroad Co. v. Bayliss*, 429.

ADDENDUM.

The following head-note should have been inserted under the title

EXECUTORS AND ADMINISTRATORS:

13. *Revocation of letters of administration, as improvidently granted.*
When letters of administration have been granted as in case of intestacy, and a will is afterwards produced and proved, the statute makes it mandatory on the court to revoke such letters on the application of the person named as executor (Code, § 2414); but, when such letters are granted on the representation of the person appointed that the decedent left no will, although the will had been already admitted to probate, and the estate administered under it for many years, the court may revoke them, on the application of any person interested in the estate, or even *ex mero motu*, as having been irregularly and improvidently made. *Watson v. Glover*, 323.



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